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Brief of Beckett for D. C. Cons.

In the Supreme Court of the United States.

NO. 756

Filed April 5, 1899.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY,

Plaintiff in Error

versus

WIRT ADAMS, STATE REVENUE AGENT,

Defendant in Error.

Error to the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM, AND BRIEF OF ARGUMENT.

R. C. BECKETT,
Attorney for Defendant in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

NOTICE ON MOTION TO DISMISS OR AFFIRM.

To MR. EDWARD MAYES, *Counsel for Plaintiffs in Error:*

Please take notice that on Monday, the 24th day of April, A. D. 1899, at the opening of the Court, or as soon thereafter as counsel can be heard, the motions of which the attached are copies, will be submitted to the Supreme Court of the United States, for the decision of said Court thereon. Annexed hereto also is a copy of the brief of argument to be submitted with the said motions in support thereof. And accompanying is the special record and all the opinions of the Supreme Court of Mississippi.

R. C. BECKETT,

Counsel for Defendants in Error for the Purposes of These Motions.

UNITED STATES OF AMERICA,

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

Before me, L. B. Moseley, Clerk of the said Circuit Court of the United States for the Southern District of Mississippi, this day personally appeared, Wirt Adams, the defendant in error in the above

styled cause, and being by me duly sworn deposes and on oath says that he this day served the foregoing notice, with the annexed motions and brief of argument, and accompanying opinions and special record on Mr. Edward Mayes, the counsel of record for the plaintiffs in error, by delivering to him in hand and in person a true copy of said notice, motions and brief of argument, opinions and special record.

Sworn to and subscribed before me this the ——— day of April, A. D. 1899, as witness my hand and the seal of said Court.

In the Supreme Court of the United States.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD CO., AND THE ILLINOIS CENTRAL RAILROAD CO.,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

MOTION TO DISMISS OR AFFIRM.

Now comes the defendant in error, Wirt Adams, State Revenue Agent, by his counsel, appearing in that behalf, and moves the Court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:—

1. No Federal question was raised or attempted to be raised in the State Courts until after the decision and judgment of the State Supreme Court of Mississippi on the first appeal to that Court, and then for the first time in the suggestion of errors, and the action of the Circuit Court below after the mandate was sent down to that Court in striking from the files the additional pleas attempted to be filed at its July, 1898, term after the Supreme Court had settled the principles of the cause, and long after the pleading terms of all the cases had expired, and out of time, raises no Federal question.
2. The action of the defendants, plaintiffs in error here, in withdrawing all their pleas on file and permitting judgment *nil dicit* to go against them, when and because the Circuit Court struck from the files their said additional pleas attempting to set up a Federal question, was an admission that they had no defense on the facts of the case, and deprived them of any right to insist on a Federal question.

3. The petition for removal of the case from the State Circuit Court to the United States Circuit Court does not present any Federal question, and was not made until after the case had been tried in the State Supreme Court, reversed and remanded, and long after the appearance terms of each and all of the cases, and overruling the same, raises no Federal question.

4. No Federal question is mentioned or relied on by the plaintiff, anywhere, and under repeated decisions of this Court that it cannot be raised by the defendants, their attempt to thus raise such a question and use it as a basis to secure a removal to the United States Circuit Court presents no Federal question.

5. The charters of the two railroad companies which by consolidation formed the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error, to-wit; that of the original Yazoo & Mississippi Valley Railroad Company was granted by the Legislature of the State of Mississippi on February 17th, 1882 (Acts 1882, p. 838), and that of the Louisville, New Orleans & Texas Railway Company by the Act of March 15th, 1884 (Acts of 1884, p. 936), amendatory of the Act of March 3d, 1882 (Acts 1882, p. 1011), after the Mississippi Constitution of December 1st, 1869, had been adopted, and had been construed in the year 1878 by the Mississippi Supreme Court in the case of Mississippi Mills vs. Cook, 56 Miss. Rep., p. 40, to prohibit the Legislature from granting irrepealable exemptions from taxation, and the decision of the said Supreme Court of Mississippi on the first appeal that section five of the charter of said Louisville, New Orleans & Texas Railway Company, under which the exemption is claimed in this case, is in conflict with Sections 13 and 20, Article 12, of said Mississippi Constitution and void, because it is in terms irrepealable raises no Federal question.

6. The decision of said Supreme Court on said first appeal, under the facts above stated, that said alleged exemption, if it existed was lost by and in the consolidation of October 24, 1892, between the said original Yazoo & Mississippi Valley Railroad Company and Louisville, New Orleans & Texas Railway Company raises no Federal question.

7. The decision of said Supreme Court on said first appeal, under said facts, that Section 180 of the Mississippi Constitution of November 1st, 1890, prevented said alleged exemption, if it existed, from passing into said consolidation of October 24th, 1892, raises no Federal question.

8. The decision of said Supreme Court under the facts above

stated that the exemption claimed in this case was repealed by the laws of Mississippi, the same being a repealable exemption raises no Federal question.

9. The action of the Circuit Court in refusing a continuance on account of the absence of alleged leading counsel, and in overruling the objections of the defendants to a trial at the July, 1898, term of the Court are matters of State practice and raise no Federal question.

10. The said Wirt Adams, State Revenue Agent, sues for the use of the State of Mississippi, and of the counties therein, of De Soto, Tunica, Coahoma, Bolivar, Washington, Sharkey, Issaquena, Warren, Claiborne, Jefferson, Franklin, Amite, Wilkinson, Tallahatchie, and Leflore, and of the towns of Tunica, Lula, Ciahoma, Clarksdale, Jonestown, Frier's Point, Shelby, Cleveland, Shaws, Rosedale, Gunnison, Leland, Hollandale, Rolling Fork, Vicksburg, Port Gibson, Russum, Harriston, Hamburg, Roxie, Knoxville, Gloster and Centerville, and neither said State, nor any of said counties, or towns are named or made parties to the citation of writ of error.

11. The sheriffs and tax collectors of said fifteen counties, to-wit: W. H. Rollins, T. O. King, R. N. Harris, G. P. Melchior, J. L. Griffin, H. J. Wright, A. N. Smith, J. M. A. Brennan, N. S. Walker, L. W. Caradine, R. S. Butler, D. M. Butler, C. H. Neyland, C. H. Fonda, W. C. George, and ex-Tax Collector J. L. Sullivan were all made parties to the first declaration under Annotated Code of 1892, section 4200, the same sheriffs and tax collectors to the second declaration, the same except Williams Griffin and Charles Kennard, instead of J. L. Griffin and N. S. Walker to the third declaration, and W. S. Wissinger, F. L. Hope, F. B. Fitzgerald, R. M. Edwards, J. B. Hebron, C. H. Walton, R. W. Smith, Dan N. Hebron, R. C. McCay, C. C. Coffey, J. P. Jones, J. B. Turnispeed, J. M. Sessions, J. H. Sullivan and J. B. Humphries to the fourth and fifth declarations, and yet none of them are named in or made parties to the cita- or made parties to the citation or writ of error.

12. The Mississippi State railroad assessors, composed of J. F. Sessions, Walter McLaurin and J. H. Askew, were each made parties to the first, second and third declarations, under said section 4200 of the Annotated Code, and said State railroad assessors composed of J. J. Evans, J. D. McGinnis and M. M. Evans were each so made parties to the fourth and fifth declarations, and yet none of them are named in or made parties to the citation or writ of error.

No Federal question is raised in this case.

14. No Federal question was raised at the proper time, nor in the appropriate way.

15. There are non-Federal questions decided, which are sufficient to sustain the judgment, without reference or regard to any alleged Federal question.

And the said defendant in error by counsel as aforesaid also moves the Court to affirm the said judgment from which said writ of error purports to have been taken, because although the record in said cause may show that this Court has jurisdiction in the premises, yet it is manifest that said writ of error was obtained for delay only.

R. C. BECKETT,

Counsel for Defendant in Error for the Purposes of These Motions.

In the Supreme Court of the United States.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND ILLINOIS CENTRAL RAILROAD COMPANY,

PLAINTIFFS IN ERROR.

versus

WIRT ADAMS, STATE REVENUE AGENT,

DEFENDANT IN ERROR.

Error from the Supreme Court of the State of Mississippi.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR ON THE MOTION TO DISMISS OR AFFIRM.

STATEMENT.

We will state generally that this is a consolidated suit embracing five separate suits, one for the taxes of 1892, one for those of 1893 and 1894 combined, one for those of 1895, one for those of 1896, and the last for the taxes of 1897, on what was formerly the property of the Louisville, New Orleans & Texas Railway Company, claimed in the declarations to be the property of the defendants, the present plaintiff in error. 2, 7 0, 9 9. 6 11, 6 2 2

The first three suits were consolidated and tried together under a consent order at the July, 1896, term of the Circuit Court of Hinds County, Mississippi.

Special Record, pp. 55-56.

There was a verdict and judgment in favor of the plaintiff for the taxes of 1895, and in favor of the defendants for the taxes of 1892, 1893 and 1894.

Special Record, pp. 68-70.

Both sides appealed to the State Supreme Court, the plaintiff as appellant and the defendants as cross-appellants. The Mississippi Annotated Code of 1892 provides that "writs of error as heretofore used are abolished; and all cases, civil and criminal, at law and in chancery, shall be taken to the Supreme Court as herein provided, and shall be dealt with by said Court without regard to the manner of removing the cases to such Court." Sec. 31.

Section 147 of the Constitution (Annotated Code of 1892, bottom page 65), provides that "no judgment or decree in any Chancery or Circuit Court rendered in a civil case shall be reversed or annulled on the ground of want of jurisdiction to render said judgment or decree, from any error or mistake as to whether the cause in which it was rendered was of equity or common law jurisdiction."

Section 3747 of the Annotated Code of 1892 makes all taxes lawfully levied "a debt due by the person or corporation owning the property or doing the business, * * * and may be recovered by action," and Section 3746 makes the taxes "entitled to preference over all judgments, executions, incumbrances or liens whensoever created" * * * and this is a re-enactment of Section 470 of the Code of 1880.

We make these citations to show that where no objection is made in the trial Court, it is immaterial under the Mississippi practice whether the suit should have been brought in the Court of law or equity proper.

On June 20th, 1898, the Supreme Court reversed the case both on the appeal and cross-appeal, on account of the compromise verdict of the jury in dividing the years on substantially the same evidence, and after settling the principles involved in the pleadings, it was remanded, and disposed of again in the Circuit Court at its June, 1898, term in favor of the plaintiff, and from a judgment in the Supreme Court on February 20th, 1899, on the second appeal, affirming the action of the Circuit Court this writ of error is prosecuted.

The present Yazoo & Mississippi Valley Railroad Company was formed from a number of railroad companies, as follows:

The Memphis & Vicksburg and Natchez & Jackson Railroad Companies were chartered by the Legislature of Mississippi in 1870, at first without any exemption from taxation, but at the same ses-

sion an exemption was given to the Mobile & Northwestern Railroad Company, by what is now generally known as the 21st section of the Mobile & Northwestern Railroad Company charter, and this 21st section was by a general bunching act extended to several other railroads by name, including said above named two railroad companies, but not to all the railroads chartered at that session.

There was an act passed on March 3d, 1882, authorizing the said Memphis & Vicksburg Railroad Company and a Mississippi Valley & Ship Island Railroad Company to consolidate and form one company, and the charters of the two companies were made a part of the charter of the consolidated company, and by the 5th section of the act the 21st section of said Mobile & Northwestern Railroad charter was made a part of the act.

The said Mississippi Valley & Ship Island Railroad Company did not go into the consolidation, and on March 15th, 1884, an amendatory act was passed authorizing any other railroad company to take the place of the Mississippi Valley & Ship Island Railroad Company, and under said act, on August 12th, 1884, the said Louisville, New Orleans & Texas Railway Company was formed by a consolidation of the said Memphis & Vicksburg Railroad Company with the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company, together with a Louisiana Company and a Tennessee Company.

This New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company was chartered on March 9th, 1882.

On February 19th, 1890, an act was passed allowing the Natchez, Jackson & Columbus Railroad Company to sell its railroad together with all rights, privileges, franchises and "immunities," and in March, 1890, it was sold under this act to said Louisville, New Orleans & Texas Railway Company.

The original Yazoo & Mississippi Valley Railroad Company was chartered on February 17th, 1882, and on October 24th, 1892, a consolidation or merger was consummated between the said Yazoo & Mississippi Valley Railroad Company and said Louisville, New Orleans & Texas Railway Company under the name of the present Yazoo & Mississippi Valley Railroad Company, one of the plaintiffs in error.

In December, 1892, there was an injunction sued out by said

Natchez, Jackson & Columbus Railroad Company against the sheriff of Adams County alone, to prevent the collection of State and county taxes on that railroad in that county, and the Supreme Court at its spring term on May 8th, 1893, sustained this injunction and held that property was not liable for taxation for that year.

In December, 1893, the State revenue agent commenced bringing these suits for the taxes on the original property of the said Louisville, New Orleans & Texas Railway Company, shown in the declarations to be the main line, Riverside Division, and Helena, Bayou Sara and Tallahatchie Branches, but not including any part of this Natchez, Jackson & Columbus Railroad. The original name of Natchez & Jackson had been changed to Natchez, Jackson & Columbus Railroad Company as shown in what is known as the Lambert Case in 70 Miss., cited below.

M. & V.R. R. Co. Charter, Acts 1870, p. 316; p. 8 Special Record.

N. & J. R. R. Co. Charter, Acts 1870, p. 221.

Acts extending 21st Section, Acts 1870, p. 327; Special Record, pp. 8-10.

The 21st Section, Acts 1870, pp. 268-269; Special Record, pp. 9-10.

Acts Authorizing L., N. O. & T. Ry. Co., Acts 1882, p. 1011 and Acts 1884, p. 936; Special Record, pp. 10-13.

Consolidation deed August 12, 1884; Special Record, p. 1.

N. O. B. R. V & M. R. R. Co. Charter, Acts 1882, p. 920; Special Record, p. 10.

Y. & M. V. R. R. Co. Charter, Acts 1882; p. 838; Special Record, p. 12.

Consolidation deed Y. & M. V. R. R. Co., Special Record, pp. 3-6.

Act Authorizing Sale N. J. & C. R. R., Acts 1890, p. 675.

N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779.

Declarations, as to what property involved, Special Record, p. 14.

In these consolidated causes the Supreme Court of Mississippi decided five things:

1st. That the Legislature could not grant an exemption to a railroad company by name as such under said Constitution of 1869.

2d. That it could not grant an irrepealable exemption under said Constitution.

3d. That a new company was formed by the consolidation of October 24th, 1892, and no exemption passed into it.

4th. That if the consolidation was a technical merger, still section 180 of the Constitution of 1890 prevented any exemption from passing into it.

5th. That any alleged exemption was repealed by the acts of 1884, 1886 and 1890.

See Opinions of June 20th, and November 22d, 1898.

See also Special Record, pp. 124-127. 3 Mull Rec p 513 & 63

No provision of the Federal Constitution was anywhere mentioned or relied on *till after this decision*, and since that time the defendants have in their suggestion of errors, petition to remove to the Federal Court, additional pleas, and in their assignment of errors on the second appeal assailed *this decision* as violative of section 10, Art. 1, and the 14th Amendment to the Constitution of the United States.

To save repetition the other material facts are omitted here, but will be narrated in the brief under the various grounds of the motion to dismiss, to which they are applicable.

The material parts of the Constitutions, laws and charters involved, including the exemption claim, known as the 21st section of the Mobile & Northwestern Railroad Company charter, are printed in the Special Record, pages 7-13, and the deed of consolidation of October 24th, 1892, is on pages 3-6.

While the consolidated case for the taxes of 1892, 1893 and 1894, and 1895 was pending in the Supreme Court, two other suits had been brought for the taxes of 1896 and 1897 respectively, and on the return of the case to the Circuit Court these two suits were also by a consent order consolidated with that, and they all proceeded under the Circuit Court, No. 2788, which was the number of the first suit.

Special Record, pp. 117-118.

BRIEF ON MOTION.

FIRST GROUND.

This is substantially the same as the 14th ground, that no Federal question was raised at the proper time or in the appropriate way, ex-

cept that it suggests in detail why this is so. There are, among others, three reasons why this ground is well taken.

1st. No Federal question was at any time raised or attempted to be raised until after the decision in the Supreme Court, on June 20th 1898, and then for the first time in the suggestion of errors, which under the Supreme Court, rule 10 (see 70 Miss., p. XXIII.), is used in practice instead of a petition for rehearing. It is as follows: "The Court will, at any time during the term at which a judgment is rendered, consider a written suggestion of error of law or fact therein, and will take such action as may seem proper."

We have printed the whole record of the pleadings up to that point in order to show that there was no attempt whatever to raise a Federal question until then. That was too late.

Miller vs. Cornwall, 168 U. S. 133-135.

Pim vs St. Louis, 165 U. S., 273.

Sayward vs. Denny, 158 U. S., 180.

Morrison vs. Watson, 154 U. S., 111.

Miller vs. Texas, 153 U. S., 535.

Loeber vs. Schroeder, 149 U. S., 580.

Bushnell vs. Crooke, 148 U. S., 682.

Schuyler vs. Bolling, 150 U. S., 85.

Powell vs. Brunswick, 150 U. S., 433.

2nd. This is a writ of error from a second appeal to the State Supreme Court, and in Mississippi as in this Court, and we suppose generally in Courts of last resort, the rule is that what has been examined and decided or could have been examined and decided on the first appeal is *res adjudicata* and cannot be re-examined on a second appeal unless it is left open by the decision.

McKinney vs. State, 117 Ind., 27-28.

Bridgeforth vs. Gray, 39 Miss., 136.

Henderson vs. Winchester, 31 Miss., 290.

Stewart vs. Stebbins, 30 Miss., 66.

Smith vs. Elder, 14 S. & M. (Miss.), 100; 13 S. & M., 138 and 445.

Supervisors vs. Kennicut, 94 U. S., 498.

The Lady Pike, 96 U. S., 461.

Sizer vs. Many, 16 How., 98.

Great Western vs. Burnham, 162 U. S., 343-344.

The plaintiffs in error may attempt to rely on the last case just cited of Great Western, etc., vs. Burnham, which leaves it open as to whether this Court will notice a Federal question on a second appeal that was not raised on the first appeal.

162 U. S., 340-341, 343-346.

But the decision refers to another exactly in point in this case, where the writ of error was dismissed, N. Pac. R. R. Co. vs. Ellis, 144 U. S. 458. 162 U. S., 344-345.

And in a later case it is held that a Federal question cannot be raised for the first time after the principles of the case have been settled by the Supreme Court, and the case reversed and remanded.

Union, etc., vs. Kirchoff, 169 U. S., 103.

This would follow logically from the ruling that the question cannot be raised for the first time on a petition for rehearing, for if it was raised in the petition for rehearing and overruled, it would overturn the established principles of *res adjudicata* to hold that it could then be raised in the inferior Court, which has no authority to overrule the Supreme Court. As we understand the rule to be deduced from these cases in 144 U. S., 162 U. S., and 169 U. S., it is this: That in order for a party to lay the proper foundation to obtain a review of his case in this Court, he must claim the right at the proper time and in the appropriate way, and that then the State Court cannot deprive him of it, if he does not abandon it himself. While the writ of error only brings up the proceedings since the first appeal *for review*, it does bring up *the record of the whole case*, and this Court on opening that record will determine first, whether the party has claimed the right at the proper time and in the appropriate way before judgment in the first appeal, and second, whether he has accepted the decision of the Supreme Court and abandoned his claim either by active or silent acquiescence, or whether he has still insisted on and retained it. It is due the State Courts that they should know at all times that the Federal question is being reserved and that it is the paramount question, which must control all others. This Court does not countenance experimenting.

Rosenthal vs. Coates, 148 U. S., 147-148.

L. & N. R. R. Co. vs. Louisville, 166 U. S., 709.

3rd. After the cause was remitted to the Circuit Court the defendants attempted to file certain "additional pleas," setting up for the first time their so-called Federal questions. These pleas attacked *the decision of the Supreme Court* and presented no Federal question, as we will endeavor to show under the argument on the 5th, 6th, 7th and 8th grounds of the motion. As to being deprived of their property without due process of law, the record shows that they were noted for their much-speaking, being heard twice in the Circuit Court and *five times* in the Supreme Court.

For additional pleas, Special Record, p. 145.

We will only deal here with questions of practice.

As shown in the bill of exceptions no leave was ever asked to file these pleas, and this was one of the grounds of the motion to strike them out, except the 2nd pleas on which plaintiff took issue.

Special Record, p. 186.

The pleading and regular trial terms had long since passed, and the cause was called peremptorily for trial. It is an unfailing rule that if a party wishes to file pleas out of time he must present them with his application so that the Court may judge whether they are such pleadings as ought to be filed.

Hunt vs. Walker, 40 Miss., 590.

18 Am. & Eng. Enc. Law, p. 505 and n. 5.

If this is not done the pleadings will be stricken out on motion.

Pool vs. Hill, 44 Miss., 306.

It is true the defendants could either on the hearing of the motion or afterwards ask leave to file them, *but this was never done.*

Pfeifer vs. Chamberlain, 52 Miss., 90-91.

If the Court should refuse to strike out, it is equivalent to leave to file, but striking them out cannot be assigned for error, for that would destroy the rule and pleading terms and give a party a right to file any kind of pleas, *sine die*, and *nolens volens.*

And even if leave had been asked to file them, it was a matter of discretion with the trial Court, and pertains to the State practice and modes of proceedure and raises no Federal question.

Stevens vs. Nichols, 157 U. S., 370-371.

Mexican Nat. R. R. Co. vs. Pinckney, 149 U. S., 199-201.

Long Island vs. Brooklyn, 166 U. S., 688.

Iowa Central vs. Iowa, 160 U. S., 389.
Hagar vs. California, 154 U. S., 639.
Sheets vs. Selden, 7 Wall., 416.
Wright vs. Hollingsworth, 1 Pet., 165.
Chirac vs. Reineker, 11 Wheat., 280.
Walden vs. Craig, 9 Wheat., 576.
Belleville vs. Cox, 109 N. Ca., 265.
Agne vs. Seitsinger, 104 Iowa, 485-486.

Of course the trial terms of the first three cases had been long past, for they had been to the Supreme Court. In the last two cases the writs were served in December, 1896, and December, 1897, and were returnable to the January, 1897, and January, 1898, terms respectively, as shown by certified copies of the writs which are filed and copied in Special Record, pp. 26-31.

These writs are not in the Supreme Court record, for the reason that under the State practice such writs are not included unless by request of a party to the suit, under Supreme Court Rule 3 (70 Miss., p. XX.), which provides that "A transcript shall not contain any part of the case except the pleadings, evidence, instructions, bills of exceptions and the order, judgment or decree appealed from, unless the appellant shall by writing, request other matters specified to be embraced in the transcript, a copy of which request shall be annexed to the transcript."

The Annotated Code of 1892 provides that "The defendant shall plead on or before the first day of the term to which the process is returnable, or within such other time as the Court by rule or otherwise shall allow;" "at the appearance term."

Pool vs. Hill, 44 Miss., 306, section 722, Code of 1892.

And "The summons in actions in the Circuit Court shall be made returnable on the first day of the term, and shall be executed five days before the return day thereof;" ib. Sec. 3417.

And in regard to suits by the revenue agent, "Such suits may be tried at the return term and shall take precedence of other suits." ib. Sec. 4194.

The Courts were held as follows: "In the County of Hinds, first district, second Monday of January and July, twenty-four days." ib. Sec. 626.

This was amended by the act of February 5th, 1898 (Acts of 1898, p. 72), to read as follows: "In the County of Hinds, first district, second Monday of January, twenty-four days; and third Monday of June, eighteen days," with the usual provision making all antecedent matters disposable of at these terms. This was after the appearance and trial terms of these cases.

Section 156 of the present Constitution (Annotated Code of 1892, bottom p. 66) provides that "The Circuit Court shall have original jurisdiction in all matters civil and criminal in this State not vested by this Constitution in some other Court,"

Hence the presumption is that its orders and judgments are correct, including the order striking out these pleas, and especially as the defendants did not *in writing*, or otherwise request these writs to be included in the Supreme Court record, but we have had certified copies of the writs made to show *affirmatively* that the attempt to file the pleas was too late.

We do not wish to claim a right to a judgment by default in these last two cases, for we now admit that there was a verbal understanding that these two cases were to take the same course as the previous cases, and this agreement was carried out in the order of consolidation. Special Record, pp. 117-118

What we do claim is that the striking out of these "additional pleas," because attempted to be filed out of time, and without leave of the Court, was not only right, but was a matter of State practice and procedure, which is not reviewable by this Court.

And besides, it is the proper practice to strike out pleas which attempt to set up points which have been settled adversely on appeal.

Agne vs. Seitsinger, 104 Iowa, 485-486.

And in the opinion of the State Supreme Court on the last appeal, rendered February 20th, 1899, they say "the futility of that sort of pleading needs no comment." Trial Rec p. 685

Another ground of the motion to strike out was that these pleas were very voluminous, stuffed with long and immaterial recitals, and rendered the true issue indefinite and uncertain, and the statute expressly authorized the striking out of such pleas. In common law Courts the rules of pleading require the issue to be reduced to a certain and definite point, in order that juries, who are not sup-

posed to be learned in the law, may have some intelligent idea of what they are trying. No ordinary jury could form the least conception of the precise issue they were called on to try in these pleas, whether the question was when the State was admitted into the Union, or when the treaty of Dancing Rabbit Creek was made, or whether the Supreme Court should be reversed, or many other useless and immaterial issues. The Code provides that if any pleading is so prolix or so framed as to hinder, embarrass or delay a fair trial on the merits, or so that the precise issue is rendered indefinite and uncertain, it may be stricken out on motion and this is the case here, and presents no Federal question.

Annotated Code, 1892, Sec. 704.

SECOND GROUND OF MOTION.

Withdrawal of Pleas, and Permitting Judgment "Nil Dicit."

There are three sets of these withdrawn pleas:—

1st. A Separate plea of the I. C. R. R. Co. to the first declaration, denying the alleged purchase of the L., N. O. & T. R. R., and a separate plea of the Y. & M. V. R. R. Co., claiming the benefit of the 5th section of its charter being a re-enactment of said 21st section of the charter of the M. & N. W. R. R. Co., reciting the consolidation of October 24th, 1892, and alleging in detail that the railroad companies had delivered the affidavits required in said 21st section, and received the tax collectors' receipts, and had never been able to pay the 8 per cent. dividend on capital stock, and denying the alleged purchase of the L., N. O. & T. R. R. by the I. C. R. R. Co.

2nd. A joint plea by the Y. & M. V. R. R. Co. and I. C. R. R. Co., setting up the same things.

3rd. A separate plea each numbered 2 of the "additional pleas," setting up the same things. Special Record, pp. 32, 33, 35, 145.

To these pleas, except the first of the I. C. R. R. Co. which concluded to the country, the plaintiff filed six replications to which demurrers were overruled. They were substantially as follows:—

1st. A denial that the L., N. O. & T. R. R. was not purchased by the I. C. R. R. Co., as alleged.

2nd. A denial that the profits had not been sufficient to pay the 8 per cent. dividend.

3rd. A denial that the taxes had been applied to the construction debts.

9th. Alleges that the proper cost of the road was not more than $4,000,000, and that the L., N. O. & T. Ry. Co. had issued $13,805,000 of four per cent. bonds, $8,731,000 of five per cent. bonds, and $8,374,000 of six per cent. bonds, and divided the proceeds except what was required to construct the road among the officers and stockholders, and that it was impossible to trace the proper construction debt or to tell what rate of interest it bears, which is a waiver of any pretended exemption.

10th. Alleges that the L. N. O. & T. Ry. Co. issued 48.242 shares of stock and disposed of the same for little or no consideration to its incorporators and others to make them stockholders; that the charter did not authorize the issuance of paid-up stock without consideration, and that the profits were sufficient to pay the dividend of 8 per cent. upon the full amount paid or agreed to be paid for the stock.

11th. Alleges that the I. C. R. R. Co. had paid off by novation with its own bonds all the construction debts and liabilities of said L. N. O. & T. Ry. Co., and the profits were more than sufficient to pay the 8 per cent. dividend on the stock.

14th. Alleges that all the railroads and branches of said L. N. O. & T. Ry. Co., except the main line and Tallahatchie Branch were acquired by purchase and did not come under the exemptive protection in the L. N. O. & T. charter.

Special Record, pp. 39-46 for these replications.

After the Court had striken out the "additional pleas" the defendants withdrew all their pleas on file and left these replications standing.

Special Record, p. 187, for withdrawal.

The verbal excuse made by them, which does not appear in the record, was that it gave the plaintiff undue advantage. That he was willing to go to trial on the facts of the case, and if he could secure a verdict in his favor well and good, but if it was adverse to him, he would then move for a judgment on the plea *non obstante veredicto*.

But this was an advantage which he had fairly gained by the

decision of the Supreme Court. In their opinion of November 22nd, 1898, pages 31, 32 and 33, they say there is evidence going to show that the railroad was not built by the L. N. O. & T. Ry. Co., and also that there is proof in the record that it had been able to pay this 8 per cent. dividend ever since the year 1888.

This Court has decided that it cannot review questions of fact even where a Federal question is involved, and the decision of the questions of fact raised by the pleas and replications would not even have involved a Federal question, but simply whether the railroad company had complied with its charter in matters *in pais*.

Egan vs. Hart, 165 U. S. 188.

Are the defendants then in any position to confess and abandon these facts and boldly ask this Court to take jurisdiction of a case which they themselves confess that they cannot sustain on the facts?

Was it not their duty to have gone on and tried the case on the facts, and if they succeeded, then the Federal question, if there was one, would have been *necessarily involved*, and that is essential to give this Court jurisdiction. As it stands, a Federal question is not and cannot be *neccssarily* involved, because the defendants stand before this Court in default or mute on the facts.

THIRD AND FOURTH GROUNDS.

Petition to remove to the Federal Court. Special Record, pp. 118-133.

This petition was filed after the case had gone to the Supreme Court and they had settled the principles of the case, and reversed and remanded it, and long after the appearance and regular trial terms of all the cases, and is so manifestly unwarrantable as to raise the presumption that the defendants did not expect it to be treated seriously, but were merely using it as a lever in a desperate attempt to lift themselves into this Court from the Supreme Court of the State. But in answer to such attempts this Court has said:

"Further, to sustain this removal would certainly violate the spirit of the removal acts, which do not contemplate that a party may experiment on his case in the State Court, and upon an adverse decision, then transfer it to the Federal Court. Here, Rosenthal has

gone through the State trial and appellate Courts, and his rights have been finally declared by the Supreme Court of the State; and though as yet no formal decree has been entered in the trial Court, it is none the less true that he has experimented with the State Courts and been beaten and now seeks a different forum."

Rosenthal vs. Coates, 148 U. S. 147, 148.

There are three reasons why the removal should not have been allowed, and several why this Court should not take jurisdiction.

1st. It was not asked for at the appearance terms. This is essential.

Fox vs. So. Ry. Co., 80 Fed. Rep. 945.

Fisk vs. Henarie, 142 U. S. 459.

K. C. R. R. Co. vs. Daughtry, 138 U. S. 303.

Martin vs. Balt. & O. R. R. Co., 151 U. S. 673.

2nd. Because the Federal question must appear from the plaintiff's own statement of his claim, and cannot be raised by the defendant in his petition for removal. Cases exactly in point are:

Penn vs. Union & P. Bank, 152 U. S. 454.

Chappell vs. Waterworth, 155 U. S. 102.

Postal Tel. Co. vs. Ala., 155 U. S. 487.

East Lake vs. Brown, 155 U. S. 488.

Mex. Nat. R. R. Co. vs. Davidson, 157 U. S. 201-208.

Oregon vs. Skottmore, 162 U. S. 490.

Oregon vs. Mullen, 162 U. S. 498.

Oregon vs. Conlin, 162 U. S. 498.

Walker vs. Collins, 167 U. S. 57.

Galveston vs. Texas, 170 U. S. 226. & 303. 171. US. 685

Right here we wish to press on the attention of this Court this idea, viz.:

We think this Court in its conservatism does not give that importance to its decisions in these matters to which they are justly entitled. It is a co-ordinate department of the government and as such entitled to as much consideration as any other.

When they decide that a certain state of case will not support a removal that is certainly the law of that case, and it ought to be *the* law of every other case occupying that identical status until it is modified or reversed. Of course it will not be the law of any case

occupying a different status, and it ought not to be considered settled if the decision is by a divided Court. But we contend that when dissenting opinions have disappeared, and it has become the settled rule of the Court, it then has all the authority of absolute law, and a case brought here in defiance of that rule should not be affirmed, but dismissed for want of jurisdiction, because the Court having settled the law that it is not removable, that eliminates from it the *color* of a Federal question of which it before lacked only the *essence*. In the steady sunlight of the rule the shadow vanishes.

3rd. No Federal question is raised in the pettition for removal.

We will argue this point under the 5th, 6th, 7th and 8th grounds of the motion as they deal with the rulings of the Supreme Court which constitute the grievances complained of in the suggestion of errors, in this petition for removal, and the "additional pleas."

What we wish to call the attention of the Court to here is, that there must be color for a real and not a fictitious, or *factitious* Federal question. The pleader cannot *create* a Federal question by any system of pleading.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

Wilson vs. North Carolina, 169 U. S. 595.

St. Joseph vs. Steele, 167 U. S. 662.

Clark vs. McDade, 165 U. S. 172.

Hamblin vs. Western, 147 U. S. 532.

And that the striking out of, or refusing a manifestly defective petition for removal raises no Federal question.

Penna. Co. vs. Bender, 148 U. S. 255.

Wilson vs. N. Ca., 169 U. S. 595.

It was said by the Chief Justice in Millingar vs. Hartupee, 6 Wall. 258, that "If a right were claimed under a treaty or statute and on looking into the record, it should appear that no such treaty or statute existed, or was in force, it could hardly be insisted that this Court could review the decision of a State Court that the right claimed did not exist."

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

In this case there is no statute *"in existence or in force"* which justified a petition for removal of this case after *"the appearance term."*

As said by this Court in the last case cited above, if it were "otherwise a Federal question might be set up in almost any case, and the jurisdiction of this Court invoked simply for the purpose of delay." If six months, why not six years, or sixty years, or after final judgment? Where will the limit be fixed? And delay is plainly the purpose here. The petition is filed after the appearance term, raised no Federal question, and is not a removable case, if it did, under repeated decisions of this Court, and there could have been no reasonable expectation of its being granted.

Another idea occurs here. We think if there ever was any Federal question presented by the refusal of this petition, it was waived and lost by the judgment *nil dicit*.

We do not contend that if a petition for removal is refused, the petitioner cannot say nothing further, and let judgment go against him, nor that he cannot go on with his case, and in either event save the benefit of his application.

But in this case the defendants did neither, and we do contend that when they did not remain silent, but took further steps in the case, and then in writing made a voluntary withdrawal of their pleas on file, and abandoned the case, they abandoned it for all purposes not saved in the written withdrawal. They did not simply stand back and let judgment go on their pleas, but actively withdrew the pleas, which was an actual abandonment of the case, and they did not save and reserve any right to afterwards insist on their petition for removal. See the withdrawal.

Special Record, p. 187.

This is a peculiar case, and we wish to make our meaning plain. For instance, a party can plead the statute of limitations, payment, and the statute of frauds. Now if the Court should overrule or strike out his plea of payment, or any of the other pleas, we do not contend that he could not withdraw the remaining pleas, which, perhaps, he could not prove, and still reserve and test his right to insist on the overruled or stricken out plea, because that would be an independent and complete defense within and of itself to the suit.

But in this case the pleas withdrawn contain the basic principle of any and all other pleas whatever. Any plea relying on the laws of this State, or the United States, or any other law, which did not as a

condition precedent allege a compliance with these requirements of the charter would be fatally defective on demurrer.

Hence when the defendants withdrew the pleas containing these defenses, although they had been set up in separate pleas, they cut out the roots of their case and left the branches to wither.

FIFTH GROUND.

That the alleged exemption is unconstitutional because in terms *irrepealable.*

For the first opinion of Supreme Court, Special R. 124-127.

While the Supreme Court of Mississippi in one of its holdings did decide that under sections 13 and 20, Art 12 of the Constitution of 1869, exemptions could not be granted to corporations as a class, while individuals were taxed (see their full opinion, pp. 19-23), and while that was within the scope of the case, still it was not strictly necessary to a decision of this particular case, and hence is not reviewable here, and we omit any argument on it, although that part of the decision is the chief stock in trade of the defendants. Full Rec p 660-66

The alleged exemption in this case purports on its face to be irrepealable, "and which agreement is irrepealable."

For this 21st section see Special Record, pp. 9, 10.

The exemption in Miss. Mills vs. Cook was not to a single corporation, but to "all manufacturing companies" of a certain class, equally and uniformly, and while it is very similar in other respects to this 21st section now in controversy, it totally omits the words above quoted, "and which agreement is irrepealable."

56 Miss. 42.

That case did decide in the words of Judge Campbell on page 53, "The Constitution says it shall be subject to taxation the same as that of individuals; and the legislative act, whether it be a charter or other form of law, which says it shall be exempt and not subject to taxation, is in conflict with the Consttution;" * * * * and in the words of Chief Justice Simrall on page 62, "If the exemption is granted in the form of a contract in the charter, that is prohibited."

That decision was rendered at the April, 1878 term, and the charter of the L. N. O. & T. Ry. Co. now in controversy, was

authorized long afterwards on March 15th, 1884 (Acts of 1884, p. 936), by an act amending the act of March 3rd, 1882 (Acts 1882 p. 1011.)

Special Record, pp. 1 and 10-13.

It is not claimed by the plaintiffs in error anywhere that their alleged exemption was ever repealed, or attempted to be repealed by the legislature. But they claim that the *decision of the Supreme Court* violates Section 10 Article 1, and the 14th amendment of the Constitution of the United States. The Supreme Court held that this exemption being in terms irrepealable was manifestly unconstitutional even under the construction in said Miss. Mills Case.

See their opinion, pp. 19, 20. Duer R. p 514. 559-560.

This presents no Federal question. It has often been held by this Court that the decisions of the State Courts construing their own antecedent laws, or Constitution, or overruling their former opinions present no Federal question. That the Constitution of the United States only guards against a *subsequent law*, and not the decisions of the Courts. The distinction between both classes was made clear in the first case cited below.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Turner vs. Wilkes Co., No. 642 in this Court, decided March 20th, 1899.

Miller vs. Cornwall, 168 U. S. 134.

Adams Exp. Co. vs. Ohio, 165 U. S. 219.

Hansford vs. Davis, 163 U. S. 278, 279.

Winona vs. Minn., 159 U. S. 528, 529.

Hagar vs. California, 154 U. S. 639.

Wood vs. Brady, 150 U. S. 20-23.

Huntington vs. Athill, 146 U. S. 684.

Brown vs. Smart, 145 U. S. 454-458.

N. O. vs. N. O. W. W. Co., 142 U. S. 87, 88

St. Paul vs. Todd, 142 U. S. 286, 287.

N. O. vs. La. Sug. Co., 125 U. S. 18-30.

Lehigh vs. Easton, 121 U. S. 388-392.

N. J. C. R. R. Co. vs. Mills, 113 U. S. 256, 257.

Boyd vs. Ala., 94 U. S. 645.

R. R. Tax Cases, 92 U. S. 575

R. R. Co. vs. McClure, 10 Wall. 511-515.
R. R. Co. vs. Brock, 4 Wall., 177.

SIXTH GROUND.

That the alleged exemption was lost in and by the consolidation of October 24th, 1892.

Summary opinion, Special R. pp. 124-127.

The present Yazoo & Mississippi Valley Railroad Company (Y. & M. V. R. R. Co.) was formed on October 24th, 1892, by a consolidation of the original Yazoo & Mississippi Valley R. R. Co. with the Louisville, New Orleans & Texas Railway Company (L. N. O. & T. Ry. Co.) and said L. N. O. & T. Ry. Co., was formed on August 12th, 1884, by a consolidation between the Memphis & Vicksburg Railroad Company (M. & V. R. R. Co.) and the New Orleans, Baton Rouge, Vicksburg & Memphis Railroad Company (N. O. B. R. V. & M. R. R. Co.) for which charters and deeds of consolidation, see

Special Record, pp. 1-13.

There are two phases to this question, one of law and the other of fact.

1st. As there is no *subsequent law* after October 24th, 1892, which is claimed to effect this consolidation or exemption in any way, it is clear that the decision of the State Court that the effect of the statutes under which the consolidation was made was to create a new corporation and that the alleged exemption did not pass to the consolidated company is merely a construction by the State Court of its own local laws, and raises no Federal question under the authorities cited under the previous ground. See also in addition—

Long Island vs. Brooklyn, 166 U. S. 688.

Iowa Centr. vs. Iowa, 160 U. S. 389.

See the admirable argument of the Supreme Court on the effect of this consolidation in their opinion of November 22, 1898, p. 1-19. Rec'd Rec'd p. 638-659

In that opinion, pp. 16-19, the Court decide that the case of N. J. & C. R. R. Co. vs. Lambert, 70 Miss. 779, known as the Lambert Case, is not *res adjudicata* as contended by plaintiffs in error and besides overrule it. That presents no Federal question. The decis-

ions of the State Courts as to the effect of their own decisions raises no Federal question.

Phoenix Ins. Co. vs. Tenn., 161 U. S., 184-186.

California vs. Holliday, 159 U. S. 415-417.

Newport vs. Newport, 151 U. S. 527-538.

In re. Woods, 143 U. S. 202-206.

San Francisco vs. Itsell, 133 U. S. 65.

It could not be *res adjudicata* because it was not pleaded or offered in evidence.

See above opinion, pp. 16, 17. Trans Rec p. 656

21 Am. and Eng. Enc. Law, pp. 258, 259, and N. 1.

So. Pac. R. R. Co. vs. U. S., 168 U. S. 2, 55-60. U.S. vs Bliss 172 U.S. 326

And the rule is that a judgment concludes not only everything which was, but everything that might have been pleaded or offered in evidence, and this rule extends to and embraces a prior judgment, which if not pleaded or offered in evidence as *res adjudicata* or an estoppel, is itself overturned, concluded and annulled by the later judgment of June 20th, 1898.

1st. Van Fleet Former Adj., pp. 90, 91.

Freeman on Judgments, Section 332.

Even if the Lambert Case had been pleaded or offered in evidence, as it was a *different railroad*, and different charter, it would not only have not been *res adjudicata*, but not even *controlling authority*, as *stare decisis* or otherwise.

Wilmington vs. Alsbrook, 146 U. S. 279-302.

But as shown above neither the doctrine of *res adjudicata* nor *stare decisis* raises any Federal question in this Court.

Central Land Co. vs. Laidley, 159 U. S. 109-112.

Phœnix Ins. Co. vs. Tenn., 161 U. S. 184-186.

See also Wood vs. Brady, 150 U. S. 20-23.

2nd. The Supreme Court also found as a fact that what was actually done, as shown by the evidence, was the creation of a new corporation. Trans Rec. p. 515. &

See their opinion of November 22nd, 1898, pages 5-8. 643 - 647

That was the finding of a fact within the competence of the Court, and its findings of fact raises no Federal question and is not subject to review.

Egan vs. Hart, 165 U. S. 188.
Israel vs. Arthur, 152 U. S. 361, 362.
Dower vs. Richards, 151 U. S. 663-672.
Backus vs. Font Street, 169 U. S. 563.

SEVENTH GROUND.

That Section 180 of the Constitution of November 1st, 1890, prevented any exemption from passing into the consolidation of October 24th, 1892.

Summary opinion, Special R. 124-127.

It will be noticed that this consolidation occurred nearly two years *after* the adoption of this Constitution.

Under this head the Supreme Court decide—

First—That a new corporation was formed and said Section 180 prevented an exemption from passing into it on the authority, among many other cases cited, of L. & N. R. R. Co. vs. Palmes, 109 U. S. 248.

St. Louis vs. Berry, 113 U. S. 475.
Schurz vs. Cook, 148 U. S. 408.
Keokuk vs. Mo., 152 U. S. 303, 310-312.
See their opinion, pp. 1-23. Fuller R. p. 638-655

Second—That even if the effect of the consolidation in this case were a technical merger, and not consolidation, that still said Section 180 would prevent the exemption from passing, for the reason that the Constitution was adopted *before* the consolidation, and the authority to consolidate is not a vested right, but a mere license, which may be withdrawn or modified at any time before it is availed of on the authority of

Pearsall vs. G. N. R. R. Co., 161 U. S. 667.
L. & N. R. R. Co. vs. Ky., 161 U. S. 695.
Keokuk vs. Mo., 152 U. S. 312.
6 Am. and Eng. Enc. Law (2nd Ed.), p. 802.
See their opinion, pp. 1 and 9-15. Fuller R. p 513. 638. 648-655
See also Galveston vs. Texas, 170 U. S. 226-240.
Bank vs. Tenn., 163 U. S. 424, 425.

So that under neither of the foregoing views is any Federal question involved.

The first proceeds on general principles of the construction of exemption laws, under repeated decisions of this and all other Courts, that an exemption from taxation is not to be implied, and that before it will pass into a consolidation the legislative intent to that effect must be clearly shown, quoting the opinion of Mr. Justice Peckham, in Phœnix Ins. Co. vs. Tennessee, 161 U. S. p. 178, that "Mere silence is the same as a denial of the exemption."

See their opinion, p. 11. Trial Rep. 650

And the second view proceeds on the ground that as an authority to consolidate is a mere license, that it will be subject to the laws in force at the time it is made, and neither of these views raise any Federal question. Under the last view the only question is, does the effect of said Section 180 prevent the exemption from passing, and this is a construction of the State Constitution by the Supreme Court of the State, and involves no Federal question in that the authority to consolidate is not a right, which before its exercise can be impaired, but a mere amendable or revocable license.

It is certainly a novel excuse set up in the petition to remove and in the additional pleas, that the defendants did not expect the Court to decide as it did, and that hence they are deprived of their property without due process of law, and that this is the first opportunity they have had to plead it. To plead what? Their surprise?

It is a very painful feeling to suddenly lose confidence in the judgment or sanity of the judges, but it is a very common thing for the Courts to decide cases, and for the lawyers and litigants on one side or the other "not to expect the Court to decide as it did," in fact we might almost venture to say it is inevitable, at least quite common, and arises naturally from the practical application of the quaint principle that it is very unwise for a Supreme Court to decide on both sides of the same question at the same time, though they sometimes do at different times.

But the pleadings show that the defendants had full notice that these points were being made and pressed, from the inception of the litigation. One of the grounds of the demurrer to their plea, which recited in detail a full compliance with the requirements of this 21st section, was that "said plea is no defense."

The 5th and 6th replications to this plea claimed that the exemp-

tion was lost in the consolidation and cut off by the Constitution of 1890.

The charges asked by plaintiff to the jury were among others a peremptory instruction, and specific charges on the effect of the consolidation; among the errors assigned in the motion for a new trial was the overruling of these contentions, and so among plaintiffs assignments of errors in the Supreme Court; and the points were all made in the brief of plaintiff in the Supreme Court, so that these points were openly and continuously pressed, and it is idle for defendants now to claim any surprise, or that they never had any opportunity to plead Section 10, Article 1, or the 14th Amendment of the Constitution of the United States. They must plead it at the *proper time* and in the *appropriate way*. Without intending to dictate, suppose they, after setting up the exemption and reciting a full compliance with the 21st section as they did, and the consolidation as they did, had just before the formal close of the plea, added something like this; "and having fully complied with the requirements of its charter in that behalf, the said defendants insist that it is a contract protected by Section 10, Article 1, of the Constitution of the United States, and that to deprive them of it now would not only violate that provision, but also the 14th Amendment to the said Constitution, because it would deprive them of their property without due process of law," would not that have been *at the proper time and in the appropriate way?*

For these demurrers, replications, charges, and assignment of errors, etc., see

Special Record, pp. 35-55, 61-64, 71, 97, and our original brief, on file, pp. 16, 17, 25-41.

EIGHTH GROUND.

That the alleged exemption was repealed by the Acts of 1884, 1886 and 1890. Nothing is said about this by the Supreme Court in the summary of their holdings delivered on June 20th, 1898, but it closes by saying "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed."

See first opinion, pp. 124-127. Duell R. p. 515.

They did not file this full opinion till November 22nd, 1898.

In the meantime, in July, 1898, the case had been again tried in the Circuit Court on this "summary," or rather the proceedings, were under it, for there was no trial.

A motion was made to strike this full opinion from the files because it contained this *new ground*.

The proper motion would have been to strike the new ground *out of the opinion*, and not to strike out the whole opinion. This motion was overruled. See opinion overruling the same. Trans. R. p. 678

But the Court in its opinion of February 20th, 1899, in the last appeal, say that as it was put in after the trial, it could not possibly have had any influence *on the trial*, and was therefore *absque injuria*, as the judgment was sustainable on the other grounds without this one.

See their last opinion. Trans. Rec. p. 687

Hence under the settled rule of this Court, that if the judgment can be sustained on any of the other grounds, this would not confer jurisdiction, even if it were "without due process of law."

But the defendants did have the chance to make this point *on the second appeal*, and as shown by the last opinion of the Court *they did make it*, devoted almost their entire argument to it, and the Court did then re-affirm it, after they had had an opportunity to be heard, and were heard, and they said nothing about the United States Constitution. Trans. Rec. p. 685-687

This settles the question that the legislature had a right to repeal it.

But this raises no Federal question, for the reason that the charter was granted by the Amendatory Act of March 15th, 1884, after the decision in the Mississippi Mills Case, 56 Miss., p. 40, in 1878, holding that all exemptions were *repealable*. The defendants are estopped to set up any contention about its being "an irrevocable appropriation of taxes," because they accept the charter under the construction in said Miss. Mills Case holding a substantially identical "appropriation of taxes" to be an exemption and *repealable*.

56 Miss. p. 42.

Before the Federal Constitution can be invoked it must *in limine* be shown that there is such a contract as is subject to impairment.

N. O. vs. N. O. Wat. Wks. Co., 142 U. S. 87, 88.

St. Joseph vs. Steele, 167 U. S. 662.

And it can raise no color of a Federal question for the legislature to repeal a *repealable exemption*, and much less for a State Court to construe its own laws where no Federal question could be involved in a construction either *pro* or *con*.

This is not in conflict with the case of Yazoo & Miss. Valley R. R. Co. vs. Thomas, 132 U. S. 174. In that case, p. 182, it was claimed that the exemption of the original Y. & M. V. R. R. Co., not this one, was a contract "irrevocable and protected by the contract clause of the Constitution of the United States; that the unwarranted application of the general laws subsequently passed, etc., is equivalent to a direct repeal of the charter exemption."

This Court, no doubt having in mind their own decisions at that time of Louisville vs. Palmes, 109 U. S. 248, and St. Louis vs. Berry, 113 U. S. 475, holding exemptions under similar constitutions void and illegal, significantly started off their opinion, p. 184, with the remark, "That the Supreme Court of Mississippi did not put its decisions upon the ground that it was not competent under the State Constitution for the State to contract with the company, that the latter should not be subjected to taxation."

If it had there would clearly have been no Federal question, but only the construction of an antecedent Constitution.

And on page 188 they say "it is agreed that the property could not be taxed until the period of exemption, whatever that is, shall have expired."

The question there was whether the exemption commenced from the date of the charter as contended on one side, or only from the time when the railroad was completed to the Mississippi river, as contended on the other, and when "it was agreed" that the exemption was a valid contract, it clearly raised a Federal question, for if the State should undertake to tax it on the theory that it was not exempt till completed to the Mississippi River, when under a legal and proper construction of the contract it was exempt from the date of the charter, such action would violate the obligation of the contract, and hence this Court was forced to decide whether the admitted exemption should commence at the one time or the other.

But in the case at bar, the State Supreme Court have decided the identical question left undecided in the above case that an irrepealable exemption was unconstitutional and void, and they show further that at the time this charter was granted on March 15th, 1884, it had been determined in the Miss. Mills Case, in 56 Miss. 40 that all exemptions were repealable, and hence a repeal could not impair the contract of exemption if any existed.

NINTH GROUND.

Under this ground we will notice two questions of practice.

1st. The jurisdiction of the Circuit Court commencing its term on June 20th, 1898, to try a case reversed and remanded to it from the Supreme Court on that day, the mandate being filed July 4th, 1898, and the case being reached and called for trial on July 4th, 1898.

2nd. The refusal to continue the case on account of the absence of alleged leading counsel.

The persistence with which the defendants have raised a multitude of Banquo's ghosts in this case, *since the Supreme Court's decision*, and named them Sections 10, Article 1, and the 14th Amendments, is utterly amazing and bewildering.

As to the point that the Circuit Court had no right to try at the June term, 1898, the affidavit of F. A. Critz shows that the defendants had due notice that the case would be called at the time it was called, and that there was an agreement, that if the case should be tried the testimony already in the record should be used to save the expense.

Special Record, pp. 142, 143.

And the record and proceedings show that the defendants' counsel were promptly on hand, but not chafing for the fray. The Circuit Court decided that it did have jurisdiction to proceed, and this was affirmed by the Supreme Court in the opinion of February 20th, 1899, and is conclusive on this Court, and not subject to review. This Court has no authority or inclination to prescribe the times and places of holding the State Courts. True Rec. p. 685-686

They say "the plaintiff did appear before the board, and was

heard by its counsel and through its officers, and the construction placed by the Supreme Court of the State on the act—a construction which is conclusive in this Court—is that the railroad companies are given the right to be present and to be heard."

Pittsburgh vs. Backus, 154 U. S. 426.

And as to the point that the failure to continue on account of the absence of leading counsel, etc., deprived the defendants of their property, without due process of law, the said affidavit of F. A. Critz, and the record also showed that Mr. Mayes, who was then present in Court, conducting the proceedings, had always prepared and filed all the pleadings and proceedings, and had personally been in the control and conduct of the case. Besides this affidavit, the record shows that the litigation has been close and prolonged, and that as a matter of fact it was argued three times before the Supreme Court, being twice remanded to the docket for that purpose, and that in allof these matters Mr. Mayes appeared for the defendants. It was also shown in said affidavit that there was an agreement, if the case was tried, to use the evidence already on hand.

Special Record, pp. 100, 101, 142, 143.

It is clear that if the absent counsel had been present they could not have legally induced the Circuit Court to overrule the Supreme Court, and it had been previously decided, both in this Court and in the State Court, that the absence of "favorite counsel" is no cause for continuance, under such circumstances.

Garnett vs. Kirkman, 41 Miss. 97-99.

Means vs. Bank of Randall, 146 U. S. 629.

We feel that it is a useless consumption of the time of this Court to dwell long enough to establish a residence on these questions.

These matters of practice in the State Courts raise no Federal question.

Hagar vs. California, 154 U. S. 639.

Lambert vs. Barrett, 159 U. S. 662, 663.

Iowa Cent. vs. Iowa, 160 U. S. 389.

Long Island vs. Brooklyn, 166 U. S. 685-688.

Besides bills of exception were taken in the Circuit Court to its action in all of these matters, and it was never intimated to that Court that its course would violate any provision of the Constitution of the United States.

All the questions raised related entirely to the State practice, and a Federal question cannot now be injected into it for the first time in the assignment of errors.

Special Record, pp. 115, 136, 143.

TENTH GROUND.

The State counties and towns not made parties.

Special R. p. 24.

It is true the statute, Annotated Code, of 1892, Section 4194, requires the Revenue Agent to sue in his own name, but "for the use of the State, counties and towns interested," and it also provides that "he shall not be liable for costs, and may appeal without bond," and we submit to this Court whether under this provision they can make the Revenue Agent liable for costs, or whether they will not have to have the real usees before them, so as to tax them with the costs, in case the judgment should be for the defendants in error. In other words whether, as the State has provided, that the Revenue Agent shall not be liable for costs, whether this Court can violate that statute, or whether their proper course would not be to render judgment for costs against the real litigants.

If the proper parties are not made, either under this or the next two succeeding heads, the proper course is to dismiss.

Wilson vs. Kiesel, 164 U. S. 251, 252.

ELEVENTH AND TWELFTH GROUNDS.

That the Railroad Assessors and tax collectors are not made parties, as required by section 4200 of said Annotated Code of 1892.

Have they not an interest in showing that they have not been in "wilful default," if this Court should take jurisdiction? And in sustaining this judgment? This section 4200 is as follows:

"In all suits against delinquent taxpayers, the assessor and tax collector shall be made parties; and if it shall appear that the failure of the tax payer to properly pay his taxes, was caused by any wilful default or negligence of the assessor or tax collector, judgment shall be rendered against the defaulter or defaulters for the amount of the compensation of the Revenue Agent."

Special R. pp. 25, 26.

THIRTEENTH, FOURTEENTH AND FIFTEENTH GROUNDS.

These are merely general grounds, and intended to cover any point that may suggest itself to the Court, which we have not touched on. In questions of jurisdiction this Court will notice *sua sponte* any vital point shown in the record.

If either the 10th, 11th or 12th ground is good, the case will be dismissed.

If the 3rd and 4th grounds relating to the petition for removal are good, then if either the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, or 8th ground is good a dismissal will follow, on the ground that if the decision of the State Court is based on any ground not involving a Federal question, the case will be dismissed, although there are other grounds which do raise such a question, or questions.

Hence we ask a dismissal for want of jurisdiction.

MOTION TO AFFIRM.

If this Court should be of opinion that the petition for removal, or any other claim set up in this cause, does raise a sufficient color of a Federal question to prevent an absolute dismissal, then we ask the Court to affirm, with damages for delay, under the authorities in this Court, that a motion to dismiss or affirm, when it appears that there is color for the motion to dismiss, and the contention of plaintiffs in error has often been determined adversely, the motion to affirm should be granted.

Sire vs. Ellithorpe, 137 U. S. 579.

The S. C. Tryon, 105 U. S. 267.

Hinkley vs. Morton, 103 U. S. 764.

St. Louis vs. Montana, 171 U. S. 650.

R. C. BECKETT.

Attorney for Defendant in Error.

N. Y. Ken. 2424 95 5614

OPINIONS OF THE SUPREME COURT OF MISSISSIPPI

Appx to Brief of Beckett for Appellees (mo.)

Supreme Court of the United States.

OCTOBER TERM 1898.

Office Supreme Court U. S.
FILED
APR 5 1899
JAMES H. McKENNEY,
Clerk.

Filed April 5, 1899

No. 957

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, AND ILLINOIS CENTRAL RAILROAD COMPANY

PLAINTIFFS IN ERROR

vs.

WIRT ADAMS, STATE REVENUE AGENT

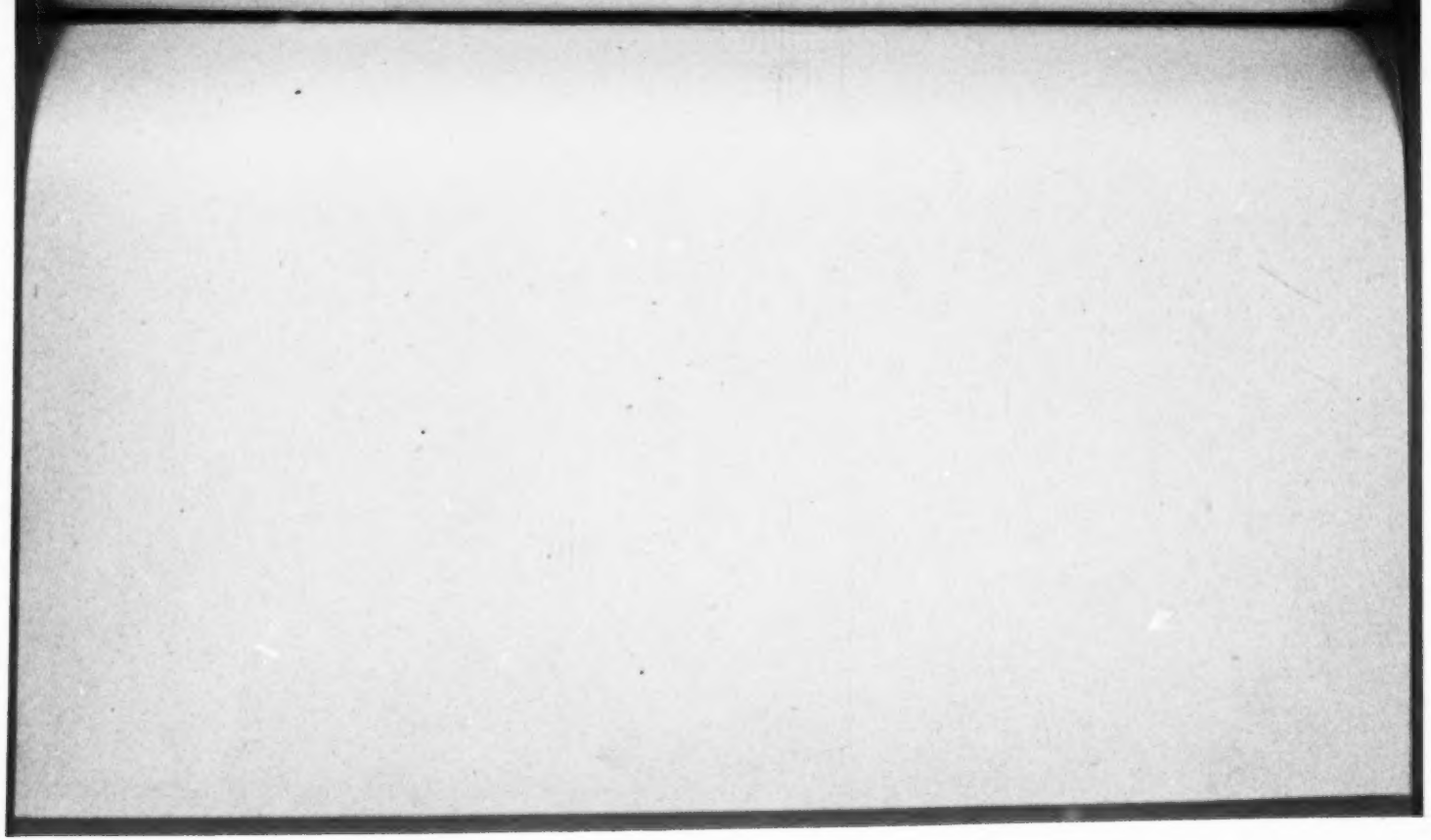
DEFENDANT IN ERROR

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

ON MOTION TO DISMISS OR AFFIRM.

R. C. BECKETT,

Atty. for Appellees.



1.

SUMMARY OF COURT.

JUNE 20TH, 1898.

POOR COPY

8629. WIRT ADAMS, REV. AGT. v. V. & M. V. R. R. CO., ET AL.

Circuit Court, Hinds County; Robert Powell, Judge.

J. A. P. Campbell and Critz & Beckett for appellant; Mayes & Harris for appellees.

SUMMARY OF THE COURT'S HOLDINGS.

WHITFIELD, J. First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is res adjudicata as to the taxes for the year 1892 on all the property that originally belonged to the N. J. & Columbus R. R. Co., which was in Adams county, and being res adjudicata, it is, as to that, beyond our power to over-rule it.

Third. The Lambert case is not res adjudicata as to any of the other taxes here involved, on the property that once belonged to the N. J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that §180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth v. Tennessee, 117 U. S.—which, is beyond

all controversy—a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear Legislative purpose was—(using the words in the sense indicated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides, that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk v. Mo. 152 U. S. do apply; that, consequently the constitution of 1890, §180, cut off the exemption; that the Lambert case can not be upheld, and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the Legislature to authorize consolidation and not merger, nor to NAME THAT, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. §181 of the constitution, and §279 of the schedule thereto, merely mean that so long as corporations existing at the adoption of the constitution having *then* exemptions, or other "rights," should have them "continue," so long as such corporations retained the *precise corporate existence they then had*. The new corporation here, takes its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure—as is expressly recited in its face—an irrepealable grant of exemption, and violative of the constitution of 1869, §13, art. 12, and §20, art. 12, even as construed in Miss. Mills v. Cook, 56 Miss. The exemption claimed in Miss. Mills v. Cook HAD NO IRREPEALABLE feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills v. Cook, turned upon some supposed magical distinction in the particular connection, between the words "SUBJECT" and "SUBJECTED," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the SAME clause, using precisely the SAME word "SUBJECT" occurs in the constitutions of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. supreme court. St. Louis &c. v. Berry, 41 Ark. 509, 113 U. S. 475; and L. & N. R. R. Co. v. Palmes, 19 Fla. 231 and 109 U. S. 253-254. And this construction is reaffirmed in Keokuk, &c. v. Missouri, 152 U. S. 310-311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the constitution—the very signification attached to it by the supreme court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills v. Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills v. Cook, that a solemn declaration in the constitution of a State—its organic law — formulating FUNDAMENTALLY GREAT LINES OF PUBLIC POLICY—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to-wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

Judge Campbell, in his dissenting opinion, in Beck v. Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on FIRST READING THEM." Doubtless the rule of stare decisis is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise than, where, as here, to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of over ruling, as we now expressly do—the Lambert case, and the case of Cook v. Miss Mills, supra. There are other views leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

WOODS, C. J. dissents and submits this mere outline of the grounds of his dissent. His dissenting opinion will be filed after the opinion of the majority of the court shall have been prepared and filed.

1. The decision of this court in the case of Natchez, Jackson and Columbus Railroad Co. v. James W. Lambert, tax-collector, 70 Miss., is *res adjudicata* as to the taxes sought to be recovered on the property of the N., J. and C. Rd. Co. for the years 1891-2. My brethren admit that that decision is *res adjudicata* as to the property of the railroad in the county of Adams. How they distinguish between the property in Adams county and that in the other counties through which the line of that railroad runs, is utterly incomprehensible. The question in the case was not whether the railroad's property in Adams county was exempt from taxation, but whether all the property of that railroad was liable for taxes.

2. The decision in the Lambert case is *res adjudicata* as to claim now propounded by the State for taxes on all the property of the N., J. and C. Railroad for the subsequent years 1893, 1894 and 1895. The parties to the former litigation and those to the present are the same, the issue—the question—is the same, the exemption or non-exemption of that railroad from taxation, and under all authorities in such case, a prior judgment is *res adjudicata*, and is a good defense to a second suit. But this very question was determined, in perfect accord with the foregoing view, by the supreme court of the United States in the case of New Orleans v. Citizens' Bank, 167 U. S. 571. No opinion of any court of last resort holding a contrary view has been unearthed by anyone after most exhaustive search.

3. As to the property, other than that of the Natchez, Jackson and Columbus Railroad, for which exemption is claimed in this suit, the sound doctrine of *stare decisis* is of striking application, under the decision of the Lambert case. That decision established a rule of property, and under the view entertained by my brethren, that rule is utterly disregarded, the rights of the defendant thereunder denied any recognition, and its property deliberately burdened in an enormous sum.

4. It may well be contended that, as to *all* the property of the Yazoo and Mississippi Valley railroad, for which exemption is claimed, the Lambert decision is *res adjudicata*. The parties in the Lambert suit and this are the same, and the issues the same. The questions in the Lambert case were, has the consolidation by merger of the L. N. O., and T., with the V. and M. V. Rd. (the N., J. & C., having been theretofore absorbed by the L., N. O. and T., by pur-

chase) destroyed the exemption claimed by the L., N. O. and T. railroad on its property; and was that exemption conferred by the charter valid, or violative of the constitution of 1869? Those are exactly the questions involved in the case before us now, and in a controversy between the same parties.

5. But that all the property of all of the railroads entering into and forming the Yazoo and Mississippi Valley railroad, whose charters gave them the exemption now claimed, should be protected from the imposition of taxes amounting to a half million of dollars, or more, under the righteous rule of *stare decisis*, seems to be too clear to the judicial mind to require argumentation. Not only the Lambert case, decided more than five years ago, but also the case of Mississippi Mills v. Cook, 56 Miss., decided more than twenty years ago, declared the exemptions claimed repealable at the will of the legislature, and not violative of section 13, article 12, constitution of 1869. In both cases, the charter exemptions were carefully considered and their character declared and the constitional provisions, with which they were supposed to conflict, expounded and clearly interpreted.

Since the decision of Cook's case, which, besides defining the character of the exemptions claimed, then and now, and distinctly declaring them not in violation of the constitution then in force declared a rule of property, the charters were granted under which the Y. & M. V. Rd. Company here claimsthe exemptions set up. It was undoubtedly, in large part, because of these exemption features in the charters thus granted, after the decision in the Cook case, and in reliance upon that decision, that the appellees constituent members, having such charter exemptions, came into the State, constructed long lines of railway and expended millions of their money. While the railroads knew, of course, that their exemptions were subject to repeal, they could not have foreseen that this repeal would be made, by judicial legislation. If ever there was a case in which the doctrine of *stare decisis* should be observed, this is the case.

It is worthy of serious consideration that the majority of the court should pay deference to the opinions of two courts of sister States in constructing the words "subject to taxation," contained in the constitutions of their States, and treat with almost contemptuous indifference the opinion of the very remarkably able court of this State which, twenty years ago, after elaborate consideration, in separate opinions of each of the judges, differently interpreted those words, all of the judges thoroughly agreeing that this exemption was not in conflict with that provision of the constitution of 1869, which declared that the property of corporations for pecuniary profit shall be subject to taxation the same as that of individuals. The spectacle thus presented to the legal mind is both humiliating and amazing, as it strikes me.

6. It will be difficult to harmonize the opinion of the majority of the court with the saving clause of the 181 section of our constitution of 1890. "Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters, or by general laws, unless sooner repealed by the legislature" is the clear and explicit language of that 181 section. Undoubtedly, under the case of Miss. Mills v. Cook, and numerous later decisions following and reaffirming that case, this railroad company was legally entitled to the exemption claimed. The highest court in the State had so declared, and this saving clause was inserted by the constitutional convention with full knowledge of the Miss. Mills case, and those following it, and the exemption has never been repealed by the legislature.

Can this court do that by judicial legislation which the constitution declares shall be done by the legislature only?

7. The Lambert and the Cook decis-

ions are themselves supported by reason and authority, and should not be over-ruled. It is lamentable if no opinions, however supported in reason or by authority, and no matter what rights may have arisen under them, are to be permitted to stand simply because not in agreement with the personal views of succeeding judges. No greater reproach can be fixed upon the judiciary, no greater calamity can befall the State than to have it understood that, with every change in the mere membership of the court of final resort, the law as solemnly declared by former courts, composed of different membership, is to be unsettled, and again and again unsettled, by every succeeding court, simply to enable new judges to exploit their peculiar views, In such case, all notion of stabillity and fixedness is gone, and absolute uncertainty and endless confusion will be introduced into our jurisprudence.

From such a condition I recoil, and am therefore compelled to dissent from the conclusion reached by my brethren. I have the profoundest respect for my brethren, and I disclaim any desire or purpose to reflect upon them or their course, in any degree whatever. But I must follow the voice of my own conscience, and the command of my own judgment.

2.

FULL OPINION OF COURT.

NOVEMBER 22D, 1898.

OPINION FILED NOVEMBER 22, 1898.

JACKSON, MISS., SATURDAY, DECEMBER 10, 1898.

8629. WIRT ADAMS, STATE REVENUE AGENT, v. & ATS. Y. & V. R. R. CO., ET AL.

Circuit Court, Hinds County; Robert Powell, Judge.

Critz & Beckett and J. A. P. Campbell for appellant; Mayes & Harris for appellees.

WHITFIELD, J. The question which lies at the foundation of this case, is this: conceding for argument's sake, that the L. N. O. & T. R. R. Co., had an exemption from taxation, did the consolidation of that railroad with the Yazoo & Mississippi Valley R. R. Co., on October 24, 1892, create a new corporation, as of that date, and thus result in the cutting off of said exemption, by Sec. 180 of the Constitution of 1890? If this question be answered, in the affirmative then, obviously, the contention of the State must prevail throughout, without regard to any other questions in the case. The power to consolidate must be granted by the State, and permission to consolidate so granted, is not a contract, but a mere license.

Amer. v. Eng. Ency. Law (2nd edition), vol 6, p. 802.

Pearsall v. G. V. Ry. Co., 161 U. S. 667.

L. & N. R. R. Co. v. Ky., 161 U. S. 695.

Keokuk v, Mo., 152 U. S. 312.

These railroad companies were perfectly free to consolidate or not. The L. N. O. & T. R. R. Co., if it had a legal exemption, could have retained it, by simply retaining the precise corporate existence it then had. Sec. 181 of Con. of 1890. Consolidation was voluntary on their part, and effected subject to the law and constitution then in force. What the effect of consolidation is, depends upon the will and purpose—not of the corporations, but of the State speaking through the legislature.

Great stress has been laid upon the provisions of Sec. 5, Acts of 1882, p. 843, to the effect that the Y. & M. V. R. R. Co. might consolidate with other railroad companies "upon such terms as they may agree upon." But this simply meant "such terms as they the companies might agree upon," consistent with the law as announced in their charters, and otherwise. The charter of the Memphis & Vicksburg R. R. Co.—one of the constituents of the L. N. O. & T. R. R. Co.—expressly stipulates any consolidation shall be "on such terms as may be consistent with the powers conferred on said company." Substantially identical language with the language of Sec. 5, *supra*, occurred in the charters under consideration in Keokuk v. Mo., 152 U. S., at p. 309, top of the page, and R. R. Co. v. Ga., 98 U. S., at p. 361, and in many other cases. These words, "upon such terms as they may agree upon," are not new. They perhaps appear substantially in all grants of power to consolidate railroad or other corporations. As for example, in The Atlanta & Richmond Air Line Railroad Co. v. State, 63 Ga., at p. 486. They have no magic in them. They are plain every day phrases and relate alone to the mere administrative details attending the consolidation of corporations, which must of course be left to the officers of such corporations, and with which the legislature can not be burdened; and they convey no substantive powers or rights. These must be found, if anywhere, expressly set forth by the legislature in the charters in the first instance, and not delegated to the corporations, to be worked out under the gloss of these mere administrative phrases. Whether, therefore, the union of these two corporations resulted in consolidation and the creation of a new corporation, or in mere merger of

the L. N. O. & T. R. R. Co. with the Y. & M. V. R. R. is to be found not in this phrase so much relied on, but in the clear purpose of the legislature. The articles of consolidation are to be carefully looked to, of course, but they must conform in what they do, if valid, to the purpose of the legislature as to what the effect of the consolidation shall be.

Keokuk v. Mo., 152 U. S. 305; Central R. R. Co. v. La., 92 U. S. 660.

Let us inquire then what the effect of this consolidation was. And first, what railroads entered into this consolidation? The L. N. O. & R. R. Co. and the Y. & M. V. R. R. Co. What was the L. N. O. & T. R. R. Co.? It is described in the "Articles of Consolidation" as "The Louisville, New Orleans & Texas Railway Company, a corporation of the states of Tennessee, Mississippi and Louisiana of the first part," and it is further expressly declared in said articles that the consolidation is effected "under and by virtue of the charters of the respective states of Tennessee, Mississippi and Louisiana, in such case made and provided," etc. The two e ds of this railroad are in Louisiana and Tennessee. Now what were the laws touching consolidation in these states, "In such case made and provided?" Of course we deal here exclusively with the Mississippi corporation under our laws; but th laws of Louisiana and Tennessee are expressly referred to as having been held in mind in effecting this consolidation, and they will materially aid us in solving this question. The road with all its property was a unit in the three states. If the effect of the consolidation in Tennessee and Louisiana was known necessarily to be the creation of a new corporation, it hardly comports with reason to suppose that any different consolidation would have been sought at the hands of the Mississippi legislature or gra ted by it, if sought. And so we shall find it to be. The Act No. 157 of 1874 of Louisiana, set forth in 40 La. Ann., p. 385—a general law expressly provides that: "Any two business — companies — may consolidate said corporations, and form *one consolidated* company, holding, etc., all property, etc., belonging to each, and under such corporate name as they may agree upon; and a certificate of the fact of such consolidation with the name of the consolidated company shall be filed and recorded in the office of the Secretary of State." This is like the Ohio and Missouri statutes referred to in Keokuk v. Mo., 152 U. S. 308-310, and they were all held to provide for a consolidation resulting in a new corporation. Board v. Gaslight Co., 40 La. Ann. 384. The provisions of the Tennessee Code (Milliken & Vertress) 1884, Secs. 1263-1270, are stronger and more explicit still in necessitating the creation of a new corporation, Sec. 1270 expressly declaring that no exemption from taxation of any constituent company should pass to the consolidated company. The Tennessee and Louisiana ends of the L. N. O. & T. R. R. are integral parts now of the present Y. & M. V. R. R. As to these ends—under Louisiana and Tennessee law the present Y. & M. V. R. R. is undoubtedly a new corporation. How, then, can this corporation—the present Y. & M. V.—an entire corporation—be one new corporation, with stock of but one corporation, the new one, in Louisiana and Tennessee, and in Mississippi, not one new corporation, and having double stock of both constituent roads? As counsel very pertinently asks, "Which is Tennesse stock, which is Louisiana stock, and which is Mississippi stock?"

What now, are the provisions of Mississippi law, as to this consolidation? The L. N. O. & T. had itself no power to consolidate, and it is conceded that this consolidation of the L. N. O. & T. with the Y. &. M. V. did not take place under Sec. 1 of the Act of 1882—the charter of the L. N. O. & T.—but that the power of con-

solidation authorized by that section was exhausted in the consolidation of the Baton Rouge Railroad with the M. & V. R. R., forming the L. N. O. & T. R. R. The provisions of law we look to then as authorizing the consolidation under consideration are Sec. 16 of the Acts of 1870, p. 326, the charter of the Memphis & Vicksburg Railroad Co.; Sec. 25 of the Acts of 1882, p. 932, the charter of the N. O. R. R. V. & M. R. R. Co.—the Baton Rouge charter; and Sec 5 of the Acts of 1882, p. 842-3 the Yazoo & Miss. Valley Railroad charter. The language of said section 16 is as follows: "That said company shall have the right and power to *consolidate* the stock, property and franchises of the road with any other road or roads, in or out of this state, at any time that the president and directors of the road may deem proper, and upon such terms as may be consistent with the powers conferred upon said company." We understand the well settled rule of law as declared by the Supreme Court of the United States to be that a consolidation of *stock* results uniformly and necessarily in the creation of a new corporation.

Clearwater v. Meridith, 1 Wall. 25; R. R. Co. v. Ga., 98 U. S. 361, 363-4; Keokuk v. Mo., 152 U. S. 308; St. Louis v. Berry, 113 U. S. 466-473; Green's Brices Ultra Vires note at p. 538.

In 98 U. S. supra, at p. 362-4, the court say: "That, generally, the effect of consolidation as distinguished from a union by merger of one company into another is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In McMahan v. Morrison, 16 Ind. 172, the effect of a consolidation was said to be a dissolution of the corporations previously existing and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those passing out of existence. So in Lanman v. The Lebanon V. R. R. Co., 30 Pa. St. 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old, as enter into the new. This court, in Clearwater v. Meridith, 1 Wall. 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with *what seems to be sound reason.*" Justice Strong who delivered this opinion also delivered the opinion in 92 U. S., where at p. 671, he referred, in the spirit of criticism, to these cases. It is, therefore, noteworthy that three years later, after fuller consideration, he says, speaking for a unanimous court, "they are in accordance with sound reason." The authority in 98 U. S., p. 361, was to "consolidate their *stocks*, upon such terms as might be agreed upon by the directors, and ratified by a majority of the stockholders; and it was unanimously held that it was not merger, as in 92 U. S. 665, nor alliance or confederation, but consolidation resulting in the formation of a new company. Said the court, at p. 364: "When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or quasi partners, in a new concern. Each set of stockholders is shorn of the power which as a separate body it had before. Its action is controlled by a power outside of itself. To illustrate: the stockholders of the Savannah & Albany Railroad Co. could not after consolidation have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf R. R. Co. They could not have built their road or controlled its manage-

ment. They could not therefore have performed the duties which, by their original charter, were imposed upon them; those duties could only have been performed by another organization composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What then, was left of the old companies? Apparently nothing. They must have passed out of existence and the new company must have succeeded to their rights and their duties; but the new company comes into existence under a *fresh grant*.

Not only its being, but its powers, franchises, and immunities, are grants of the legislature which gave it its existence. Since, then, a consolidation of the stock of two corporations means the creation of a new corporation, it necessarily follows that the power to consolidate given by this Sec. 16 supra did not authorize a merger, or any consolidation except such as resulted in the formation of a new company. The next source of power to consolidate is Sec. 25, Acts 1882, p. 932 supra: That provides: "That the company shall have power and authority to * * * consolidate the company with any other company, under the name" (not under the name *and charter* as in 92 U. S., p. 667) "of one or both; but when such * * * consolidation is effected, the said company shall be entitled to all the benefits, rights, franchises, lands and property of every description belonging to said road or roads so consolidated." The language here sharply distinguishes between the old companies and the new in a way that makes it perfectly clear the legislature meant the consolidation to result in the creation of a new corporation. Said company, that is the new consolidated company, may be under the name of one, but not the charter of one; on the contrary it, said company, shall be entitled to all the benefits, etc., etc., belonging to said *roads—all* of them *so* consolidated. Manifestly the legislative purpose here was the consolidation of two or more companies into one new company. No power can be found here for merger. The next source of power to consolidate is Sec. 5 of the Acts of 1882, p. 843, which provides: "Said company may consolidate with any other railroad company in or out of the State of Mississippi upon such terms as the consolidated company may agree upon; and upon any such consolidation the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises herein granted; but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidated company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company." Clearly here also, it is consolidation and not merger which is provided for, and such consolidation as should result in a new company, a "consolidated company which should" enjoy all the property, etc., etc., of its previously existing constituent companies. It will not fail to be noted that in none of these acts is the word merger ever used. Always, and everywhere, it is "consolidation" alone that is authorized. If merger merely was intended, what was easier than to have used the words appropriate to manifest that intention? Why this careful and exclusive use of the word "consolidation?" And not of this word only, but of other terms indicating

a clear intention to create a new consolidated company? We conclude, therefore, on a review of the statutes authorizing the consolidation under review that so far as the purpose of the legislature was concerned, it was its clear purpose that consolidation and not merger should occur, and such consolidation as should result in the creation of a new corporation.

Counsel for the railroad company relies on three authorities especially to show that what the legislature here intended was merger.

Tomlinson v. Brouch, 15 Wallace 460:

The Central R. R. Co. v. Ga. 92 U. S. 666; and

Meyer v. Johnson 53 Ala. 313.

But in Tomlinson v. Brouch Mr. Justice Bradley properly characterized what was done as "amalgamation" which is merger and not consolidation p. 463 15 Wall,, and the act of the legislature expressly provided for merger. It provided p. 463 that "the said South Carolina Canal & R. R. Co., shall be *Merged* in the said South Carolina R. R. Co." and provided expressly that the South Carolina R. R. Co. should retain its autonomy and previous existence. There was no room for construction in this case and it was conceded on all hands that what occurred was merger. So in Central R. R. Co. v. Ga. it was expressly provided —92 U. S. p. 671—that the union should take place under "the name and *charter* of the Central R. & Banking Co." merger was clearly provided for: p. 671-3. And in Meyer v. Johnson 53 Ala., the court lay stress upon the word "Unite" p. 318, "were *united* with those of the Alabma company and vested in it so as to enable it, (*called* in the contract the consolidated company, because their franchises were consolidated *with* its)" etc. etc, —a case again of merger. The authorities are wholly inapplicable to a case like this, where the statutes all sedulously avoid the word merger, exclusively use the word consolidate, and accompany that word—definite enough in itself—with other provisions which leave no doubt that consolidation resulting in the creation of a new corporation was intended. Turning now from the legislative purpose, let us see what was actually done in pursuance of this power to consolidate.

First, the stock of the two companies was consolidated. Learned counsel for the railroad insists that the testimony of Welling shows that the stock was never exchanged. He is mistaken in this. Welling does so state, but on cross-examination expressly declares on this very point, "I do not know as to that question, I do not recall the fact just what was done"—and he is a witness for the railroads. This falls far short of showing that the stock was not exchanged, the other testimony shows it was.

Second. The deed of consolidation on its face provides for and creates a new organization and new officers, see articles 4, 5, 6, 7; and article 8.

Third. The fifth article of consolidation conveys all the "rights—property etc., etc., etc., of every kind belonging to *either* of the parties,—to the Consolidated Company, without any further act deed or conveyance" distinguishing clearly between the two previous companies—"either of the parties"—and the new company, the grantee, the "Consolidated Company."

Fourth. The articles of incorporation themselves, on their face declare that doubt exists as to the effect of what has been done and conclude most significantly. "But whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." This is pregnant with meaning. The R. R. companies knew that the only power the legislature had given was to so consolidate as to create a new corporation, and that under Sec. 180 of the Constitution of 1890 the exemp-

tion if any existed would be cut off. They knew the only word used was "consolidate" in all the legislative acts, and that merger and consolidation are very distinct and different things. And yet—not conforming to the power, but seeking to carry the exemption in spite of it—they used the words "unite, merge, and consolidate,' and say that "such consolidation shall be effected by uniting or merging the stock, property and franchises of the L. N. O. & T. R. R. Co. with and into the stock, property and franchises of the said Yazoo & Miss. Valley Railroad Company without disturbing the corporate existence of the last named company, or the formation of any new distinct corporation, unless such result shall be necessary to give legal effect to this agreement; but whatever may be the legal consequence of the consolidation herein provided for, this agreement is to stand and be effective." Doubtless they desired to merge; but the legislature had only authorized consolidation and such consolidation as necessarily resulted in the creation of a new corporation, and they could only lawfully do, what the legislature, in fact, authorized: not what they might wish to do. And the words "consolidate upon such terms as they might agree upon," means that the thing done must be consolidation but the mere administrative details of uniting the two into one new corporation were left to the companies; names count for nothing. It is substance courts look to. Consolidation resulting in the creation of a new corporation is what the legislature authorized: is what the articles of consolidation actually effected, and it is utterly beyond the power of the railroad companies to change the essential nature of what was done by calling it "merger."

We have not adverted to all the considerations sustaining this view. The closer the analysis of the articles of consolidation and of the action of the authorities of the two companies the more indisputably it appears that such consolidation as resulted in the creation of a new corporation was precisely what was effected. The notice for a meeting of the stockholders called for August 1, 1893, is a meeting of the stockholders of the Y. & M. V. R. R. Company. The minutes recite that it was a meeting of the stockholders of the Y. & M. V. Railroad Company and gives the number of shares and names of the holders, and all this is true also of the meeting of stockholders of October 4, 1893. Again, on August 1, 1893, a resolution was passed "that the stock, property and franchises of said two corporations had been merged or united in *one single corporation* under the corporate name of the Y. & M. V. Railroad Company. Another resolution was passed reciting that the Y. & M. V. Railroad Company was the "Successor" or assignee of the L. N. O. & T. Railroad Company. Of course the mere *name*—Y. & M. V. Railroad Company— is utterly immaterial in determining whether it is attached to the same old company known as the Y. & M. V. Railroad Company or to the consolidated company, the new company, and this action of the stockholders as well as the articles of consolidation pointed clearly to the same result—consolidation and not merger. The new company was the successor or assignee of the two old companies and the language of Mr. Justice Brown of of the Supreme Court of the United States in Keokuk v. Mo. 152 U. S. 309, fits in here as if uttered for this case: "It is impossible to conceive of a corporation existing without stock or certificates representing the interests of the corporators in the organization. Now if the act provides (the deed in the case at bar) that these certificates shall be surrendered and certificates in another company issued in their place, what becomes of the prior companies? Who are their stockholders?

Who their officers? (The deed in this case appoints an entirely new set of officers. See Charter Book pp. 731-732) If the stock in the new company is sold what interest in the prior companies passes by the sale? There can be but one answer to these questions. The property and franchises of the prior companies are gone, as much as if they had surrendered their charters. The new company doubtless received by transmission from its constituent companies their property, rights, privileges and franchises including any immunity from taxation: but it receives them as an heir receives the estate of his ancestor, or as a grantee receives the estate of a grantor, by inheritance, succession or purchase. The result is not a mere union or partnership of two companies nor the merger of franchises of one in another, but the extinguishment of one and the creation of another in its place. It follows from this that when the new corporation came into existence it came precisely as if it had been organized under a charter granted at the date of the consolidation, and sublect to the constitutional provisions then existing." To the same effect also is St. Louis v. Berry 113 U. S. 469-475. Article 2 of the articles of consolidation is as follows: "The corporate name of the said Consolidated Company shall be the Yazoo & Mississippi Valley Company. Articles 3 to 8 inclusive are as follows:

"Article 4. Every holder of the stock of either of the said companies now outstanding, shall be entitled to cast *one vote* for *each* share of stock, held by him in the stockholders meetings of the Consolidated Company, which vote may be cast either in person or by proxy, and shall have all the rights of a stockholder of the Consolidated Company, as fully as if new shares of the Consolidated Company had been issued and exchanged therefor; and in case the *Consolidated Company* shall determine to issue new shares such shares shall be exchangeable at par for the now outstanding shares of *each* of the *constituent* companies; and the remainder of the capital stock of the Consolidated Company shall be issued from time to time and upon such terms and conditions as may be prescribed by the Board of Directors of said company.

"Article 5. All and singular the rights, powers, privileges, immunities and franchises, and all the railroads, real and personal estate, easements, fixtures equipments choses in action, and property and assets of every kind, nature or description belonging to either of the parties hereto, shall be vested in and become the property of the said *Consolidated Company*, without any *further act, deed* conveyance or assurance being required in the premises.

"Article 6. The affairs of the Consolidated Company shall be managed by a Board of Directors which shall consist of such a number of members not less than five. as the company may determine from time to time, each of whom shall be a stockholder, and one of them a resident of the State of Mississippi, one of Tennessee and one of Lonisiana. The members shall be divided into three equal classes as nearly as practicable. Successors, for the term of three years, shall be chosen for those belonging to the first class at the first annual meeting of the stoskholders held after this consolidation shall have been effected; for those who belong to the second class at the next annual meeting; and for those belonging to the third class at the next succeeding annual meeting of the stockholders. Each director successively chosen shall continue in office until his successor is elected. Vacancies in the Board caused otherwise than by expiration of term for which the retiring director was chosen, may be filled by a vote of a majority of the directors remaining, such appointee to continue in office until the next

regular election of directors by the stockholders.

The first Board of Directors shall be composed of the following members divided into three classes as follows:

First Class. Stuyvesant Fish, Adolph Schreiber, W. C. Craig, Chas. A. Peabody, Jr.

Second Class. John W. Auchinloss, Walther Luttgen, Edward H. Harriman, J. T. Harahan.

Third Class. S. V. R. Cruger, R. P. Neeley, R. C. Shepherd, John C. Welling.

Article 7. The Board of Directors of said Consolidated Company shall choose one of their number president whose term of office shall be one year, or until his successor shall be chosen or qualified. They may also appoint such other officers and agents as they may deem necessary from time to time and prescribe their duties and compensation; and may provide, by the by-laws to be adopted, such rules and regulations relating to the affairs and business of said company as may be necessary or proper. The said Board shall also have power to appoint an Executive Committee, of whom the president shall be one ex-officio, who shall possess and exercise all the powers and duties of the Board of Directors, when the Board is not in session. Until otherwise ordered the corporate seal of the said Consolidated Company shall be that of the Yazoo & Mississippi Valley Railroad Company.

Article 8. The said *Consolidated Company* shall be and the same is hereby authorized and empowered in such a manner and upon such conditions as are permitted by law, to issue its bonds and secure the same, as well as all bonds heretofore issued by *either* of the *constituent* companies, or that have been heretofore or may be hereafter issued by any other railroad company, by mortgage or deed of trust, upon all or any of its railroads, rights, franchises and property, real and personal, wherever the same may be situated, and whether the same may be owned by said company at the time this consolidation is effected or may be hereafter acquired; and may also exercise any and every other corporate right, or power now vested in, or which might have been heretofore lawfully exercised by *either* of said *constituent* companies."

It will be seen that said Article 5 itself conveys all the property, rights and franchises, etc., belonging to either constituent to the *consolidated* company without any further act, "deed, conveyance or assurance being required in the premises," and in this regard is substantially identical with the provisions in St. Louis v. Berry, 113 U. S., 475, and Keokuk v. Mo., 152 U. S., 308, both of which cases hold that a new corporation was created. It will be noticed also that Article 6 creates a new organization and actually names a new set of directors for the consolidated company who are under Article 7 to elect officers for the Consolidated Company. It will be noticed that Article 8 authorizes the new Consolidated Company to "issue its bonds and secure the same as well as all bonds heretofore issued by *either* of the *constituent* companies," and further provides "that the Consolidated Company shall exercise any and every other corporate right or power now vested in or which might have been heretofore lawfully exercised by *either* of said *constituent* companies," clearly drawing the distinction between the *two* previous *constituent* companies and the *new Consolidated* Company; and it will further be specially noticed and to this we direct the closest attention; that Article 4 provides "That every holder of the stock of *either* of the said companies now outstanding shall be entitled to cast *one* vote for *each* share of stock held by him, in stockholders meetings of the Consolidated Company and shall have all the rights of a stockholder of the Consolidated

Company as fully as if new shares of the Consolidated Company had been issued and exchanged therefor." Now it is clearly admitted by both sides that the L., N. O. & T. Railroad Company was dissolved and became extinct. The L., N. O. & T. Railroad Company had 50,000 shares of stock; the Y. & M. V. had 6,000 shares of stock, and if anything is certain, it is, undoubted, that it is a metaphysical and legal impossibility that a corporation with 6,000 shares of stock could absorb one with 50,000 shares and allow *one* vote to *each* share. It is well said by counsel for the Revenue Agent: "The voting power of the latter is more than eight times that of the former and it could absorb the former and seven more like it, and no legislative declaration or judicial dictum could alter this fact; for it is founded in the nature of things. The deed of consolidation provides for the contingency and says whatever the effect that consolidation shall stand and be effective. What is then effected? If the L., N. O. & T. Railroad Company is extinguished and the voting power of each share of stock is equal and extends equally over all the property, rights, operations and franchises of the Consolidated Company you may put in what name or call it what you may, but the actual result is a complete and perfect consolidation with the combined voting power of both. One cannot absorb 8 1-3, but one and 8 1-3 can make 9 1-3, a NEW number."

We have thus far been discussing two things: the purpose of the legislature in authorizing the consolidation and what was actually done in pursuance of that authority, and it is perfectly clear that what the legislature authorized and what was actually created in fact in pursuance of that authorization was consolidation of such character as resulted in the creation of a new company under the name of the Y. & M. V. Railroad Company; that the Y. & M. V. Railroad Company with which we now deal is not the old Y. & M. V. Railroad Company—one of the constituent members—but is the NEW Y. & M. V. Railroad Company, a new consolidated company taking its grant of corporate rights from date of said consolidation October 24, 1892, some two years after the constitution of 1890 went into effect. This leaves for solution on this branch of the case a single inquiry, did section 180 of the Constitution of 1890 cut off the exemption claimed by the L., N. O. & T. Railroad Company, conceding now for the purpose of argument, that it ever had any such exemption. That section is in the words following:

Section 180. "All existing charters or grants of corporate franchise under which organizations have not in good faith taken place at the adoption of this constitution shall be subject to the provisions of this article; and all such charters under which organizations shall not take place in good faith and business be commenced within one year from the adoption of this constitution, shall thereafter have no validity; and every charter or grant of corporate franchise hereafter made shall have no validity, unless an organization shall take place thereunder and business be commenced within two years from the date of such charter or grant."

It is too clear for argument that the "power to consolidate is the grant of a corporate franchise". 2nd Morawetz Priv. Cor. Sec. 954 p. 905; Ashley v. Ryan, 153 U. S. 436-463. It is not a right but a mere license as heretofore shown. It takes effect not as of the date of the charter, but as of the date of the deed of consolidation. Keokuk v. Mo. 152 U. S. 308. A corporation can have no status or existence until organized. 1 Morawetz Priv. Corp., 288. Unless therefore the present Y. & M. V. R. R. Co. had been organized at the date of the adoption of the constitution it is settled that it could not possibly have been legally entitled

to an exemption at that time. Planters Fair, etc., v. State, 161 U. S. 192. A corporate franchise is the right to exist as a corporation. It is the franchise invested in the individual stockholders before a corporation is authorized authorizing them to form such corporation by organization. This is the precise corporate franchise meant by Sec. 180 of the constitution. There is an exact analogy between this corporate franchise authorizing individuals to organize themselves into a corporation, and the franchise authorizing constituent corporations and artificial persons to organize themselves into a Consolidated Company. and in the one case as in the other, the result of the organization must be a new company. There are various other franchises which may belong to corporations such as the right to be and operate a railroad after the corporation is organized, receive tolls, etc., but this belongs to the corporation as an artificial person. It is clear, therefore, that the corporate franchise referred to in sec. 180 is the right to exist as a corporation. It is thoroughly settled by the United States Supreme Court that the effect of sec. 180 of the constitution of 1890 was to cut off any exemption claimed if it ever existed. St. Louis v. Berry 113 U. S. 475: Keokuk v. Mo. 152 U. S. 308.

Learned counsel for the railroad companies insist that under sec. 181 of the constitution and sec. 279 in the schedule of the constitution this exemption was continued. These sections are in these words:

"Sec. 181. The property of all private corporations for pecuniary gain shall be taxed in the same way and to the same extent as the property of individuals, but the legislature may provide for the taxation of banks and banking capital, by taxing the shares according to the value thereof (augmented by the accumulations, surplus, and unpaid dividends), exclusive of real estate, which shall be taxed as other real estate. Exemptions from taxation to which corporations are legally entitled at the adoption of this constitution, shall remain in full force and effect for the time of such exemptions as expressed in their respective charters or by general laws, unless sooner repealed by the legislature."

Section 279 is as follows:

Section 279. All writs, actions, causes of actions, proceedings, prosecutions, and rights of individuals and bodies corporate, and of the State, and charters of incorporation shall continue; and all indictments which shall have been found, or which shall hereafter be found, and all prosecutions, begun, or that may be begun, for any crime or offense committed before the adoption of this constitution may be proceeded with and upon as if no change had taken place."

This is a wholly mistaken view of these provisions of the constitution: Sec. 181 preserves only such exemptions as corporations fully organized prior to the constitution, were LEGALLY entitled to, at the adoption of the constitution. Its meaning plainly was that if corporations organized and existing at the date of the adoption of the constitution should retain the precise corporate existence they *then* had, such exemptions as they *legally* had should continue whilst their corporate organizations remained as they were. It has nothing to do with the preservation of exemption to any corporation existing at the date of the adoption of the constitution which ceased to retain its said precise corporate existence, and became consolidated with another corporation, thereby ceasing to exist. Section 279 meant the same thing, to-wit: That, Charters of Incorporation belonging to corporations at the date of the adoption of the constitution were not in any way to be infringed by the constitution so long as such corporations retained their precise previous corporate organization.

This, and this only, is the whole scope of the two sections. Their plain meaning is in harmony with the whole spirit of the chapter on corporations in the constitution, and cannot be frittered or pared away by ingenuity or refinement.

It was well said by Mr. Justice Brown in Keokuk v. Mo. 152 U. S. at p. 312, "But the decisive answer to this objection is that the legislature had no power, in 1869, to extend to a new corporation created by the consolidation an exemption contained in an act passed in 1857, before the constitution was adopted, and hence, under the terms of this act, we cannot hold that immunity from taxation passed as a franchise or privilege to the consolidated corporation. The construction claimed by the defendant would be directly in the teeth of the constitutional provision that no property shall be exempted from taxation. While, as heretofore observed, an exemption from taxation contained in a charter previously granted could not be taken away by this constitutional provision without the impairment of the obligation of a contract, it doubtless applies to all corporations thereafter formed either by original charter or by the consolidation of prior corporations under the act of 1869."

It is further clear that if the different charters relied upon had expressly provided by the use of the word "immunity" or by direct declaration to that effect, that the alleged exemption of the L., N. O. & T. should pass into the Consolidated Company, section 190 of the constitution of 1890 still cut off the exemption, since the constitution is the paramount law of the land,—the consolidation having taken place some two years after its adoption. It is so expressly held in the L. & N. Railroad Company v. Ky. 161 U. S. 695, and Pearsall v. G. N. Railroad Company 161 U. S. 167. And, in this view, it of course becomes immaterial whether the position of learned counsel for the railroad that the exemption passes by *general law* into the Consolidated Company without *express declaration* is correct or incorrect, though we understand the Supreme Court of the United States to have distinctly held that the sovereign right of taxation does not so pass unless there be either express declaration to that effect or the use in statutes authorizing the consolidation of the word "Immunity". And that court has distinctly held as "the later and best considered view, sustained by the weight of authority," that the use of the word franchise or privilege or any other word than the word immunity is not sufficient to embrace an exemption from taxation.

Phoenix Ins. Co. v. The State, 161 U. S. 176;
Keokuk v. Mo., 152 U. S. 304;
Covington v. Sanford, 164 U. S. 586;
Norfolk v. Pendleton, 156 U. S. 172;
Pickard v. Railroad, 130 U. S. 640;
Railroad Co. v. Palmes, 192 U. S. 451;
me Ins. Co. v. The State, 161 U. S. [illegible].

On this very point Mr. Justice Peckham in Phoenix Ins. Co. v. Tennessee, 161 U. S., p. 178 says: "The inference is sought to be drawn in favor of exemption if the legislature did not *affirmatively* grant the right to tax. We cannot assent to any such view and we could come to no such conclusion from an examination of the general statutes cited by counsel. It is a complete *over-turning* of the *universal rule* in *regard to taxation*. The power and the right to tax are always presumed, and the exemption is to be clearly granted. Mere silence is the same as a denial of exemption." Nothing certainly can be clearer than this. Indeed the opinion of Mr. Justice Peckham in this case is so clear and forcible that we quote from it to adopt the following passages on this particular proposition:

"In Wilson v. Gaines, 9 Bax. 546, it was held by the Supreme Court of Tennessee that as the State in its constitution (article 11, sec. 7, constitution

1834) used in the same connection all the words "rights", "privileges", "immunities" and "exemptions", each of these words was to be given, in interpretation, a meaning so limited as not to include anything expressed by the others and that when any one of them is found in a statute the legislature must be conclusively presumed to have used it in its restricted sense. This decision of the Tennessee court tends very strongly to the idea that the words "immunity" or "exemption" would have been required to secure the exemption to a company in a case like this. It is true that this view was not assented to by this court as being the correct one in Tennessee v. Whitworth, 117 U. S. 139, 146, and it is simply cited for the purpose of showing what the Tennessee court did decide in regard to the meaning of its own constitution in reference to this subject.

That the legislature was, about the time, freely incorporating various companies and granting them exemption from taxation with considerable liberality, is not a sufficient reason to induce this court to depart from the universal and well established rule making a claim for exemption a matter to be *proved beyond all doubt*. The circumstance which we regard as very significant and which has already been alluded to, consists in the omission of the word "immunities" in the grant to plaintiff in error. That omission we attach great weight to, and the least that can be said of it is that it involves the question in doubt.

It can not be denied that the decisions of this court are somewhat involved in relation to this question of exemption. It is difficult in some cases to distinguish the language used in each so far that the different results arrived at by the court can be seen to be founded upon a real difference in the real meaning of such language. The question has sometimes arisen upon the consolidation of different companies, and sometimes upon a sale under a mortgage foreclosure. Among the former is the case of Keokuk & Western Railroad v. Mo., 152 U. S. 301, where under the laws of Missouri (sec. 4 of the Act of March 2, 1869) there was a provision that the Consolidated Company should be "subject to all the liabilities and bound by all the obligations of the companies within this State" and "be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place". The question was said to admit of doubt, whether under the name "franchises and privileges" an immunity from taxation passed to the new company. Various cases are cited in the opinion which was delivered by Mr. Justice Brown showing the grounds taken by this court in such cases. In Chesapeake & Ohio Railway v. Miller 14 U. S. 176, (a foreclosure case) it decided that an immunity from taxation enjoyed by one railroad company did not pass to the purchaser under the foreclosure of a mortgage, although the act provided that the purchaser should forthwith become a corporation, "and should succeed to all such franchises, rights and privileges as would have been had by the original company but for such sale and conveyance". The case followed that of Morgan v. La., 93 U. S. 217 (also a foreclosure case) where it was held that the words "franchises, rights and privileges" did not necessarily include a grant of exemption or immunity from taxation. See also, to same effect, Memphis & Little Rock R. R. v. Railroad Commissioners, 112 U. S. 609. The case of Pickard v. Tennessee, etc., Railroad, 130 U. S. 637, 642, may also be referred to, upon the point that exemption, although it might be granted must be considered as a personal privilege not extending beyond the immediate grantee unless otherwise so declared in express terms; and it was therein declared that such immunity would not pass merely by a conveyance of the prop-

erty and franchises of a railroad company, although such company might itself hold property exempt from taxation. In that case Mr. Justice Field, speaking for the court said: "It is true there are some cases where the terms 'privileges' has been held to include immunity from taxation, but that has generally been where other provisions of the act have given such meaning to it. The later, and we think, the better opinion, is that unless other provisions remove all doubt of the intention of the legislature to include an immunity in the term franchise, it will not be so construed. It can have its full force by confining it to other grants to the corporation." This language is referred to by Mr. Chief Justice Fuller in the case of Wilmington & Weldon R. R. v. Alsbrook 146 U. S. 279, where, at page 297 he says: "We do not deny that an exemption from taxation may be construed as included in the word 'privileges', if there are other provisions removing all doubt of the intention of the legislature in that respect", citing the Pickard case.

Looking at the other side, we find the case of Humphrey v. Pegues, 16 Wall. 244, where there was a grant to a railroad company of "all the rights, powers and privileges" granted by the charter of another company which exempted the property of such other company from taxation, and it was held that the property of the first company was thereby also exempted. Mr. Justice Hunt in delivering the opinion of the court said that: "A more important or more comprehensive privilege than a perpetual immunity from taxation can scarcely be imagined". It contains the essential idea of a peculiar benefit or advantage or special exemption from a burden falling upon others". Again, in Tennessee v. Whitworth, 117 U. S. 139, it was held that a right to have shares in its capital stock exempt from taxation within the State was conferred upon a railroad corporation by a State statute granting to it "all the rights, powers and privileges", or granting it "all the powers and privileges" conferred upon another corporation named if the latter corporation possessed by law such right of exemption. The question in that case arose as to the meaning of certain statutes passed by the legislature of Tennessee resulting in the consolidation of certain railroads therein mentioned. In the course of his opinion Mr. Chief Justice Waite cites the case of Philadelphia, Wilmington & Baltimore Railroad v. Maryland, 10 How. 376, 393, where Mr. Chief Justice Taney speaking of a statute which authorized the union company to have "the property, rights and privileges which that law or other laws conferred on them", (the separate companies or either of them), said that such language extended to the union company the exemption from taxation contained in the charter of one of the united companies. Mr. Chief Justice Waite, continuing in his opinion said: "As has already been seen the word "privilege" in its ordinary meaning when used in this connection includes an exemption from taxation". The decision of this last case should be *confined* to the *peculiar language* used in the various statutes therein cited, wherein, aside from the word "privilege", it may be argued that, considering all the language used in those statutes, the intention of the legislature to exempt the company named from taxation may fairly well be made out.

The later cases of Pickard v. Tennessee, etc., Railroad Co., 130 U. S. 637, and Wilmington, etc., Railroad v. Alsbrook, 146 U. S. supra., show that there must be other language than the mere word "privilege" or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted. The case of Mobile & Ohio Railroad v. Tennessee, 153 U. S. 486 adds nothing to the discussion on

either side. The particular point was not in that case, but it seems to be cited by counsel for plaintiffs in error for the purpose of showing what was the general condition of the State at the time of the adoption of the constitution in 1834, and what was the policy of the State in regard to internal improvements which the constitution declared ought to be encouraged. The incorporation of an insurance company would hardly come within the most liberal meaning of the term "internal improvements". If this were an original question, we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the *present time the weight of authority* as well as the *better opinion*, is in favor of the same conclusion which we should otherwise reach."

It is impossible for us to add to the elegance, clearness or force of this reasoning. It will be noted too that the court says that the case of Tennessee v. Whitworth, 117 U. S. 139, "must be confined to the language used in the various statutes therein cited, wherein, aside from the word privilege, it might be argued that considering all the language used in those statutes the intention of the legislature to exempt the company named from taxation may fairly well be made out." Tennessee v. Whitworth seems fairly to be shaken as authority by the later decisions of the Supreme Court of the United States, and whether it is sound or unsound cuts no figure in this case, since in that case no new constitution intervened. The material fact, that in this case a new constitution does intervene, constitutes the decisive difference between this case and Tennessee v. Whitworth, and makes this case fall within the principle of Keokuk v. Mo., and St. Louis v. Berry, supra. See also Morgan v. La., 93 U. S. 223, M. & O. Railway Company v. Miller, 114 U. S. 186. We therefore reach the conclusion that the consolidation of the L., N. O. & T. with the Y. & M. V. Railway Co. resulted in the creation of a new corporation, the present Y. & M. V. R. R. Co., and *that* consolidation having been effected October 24, 1892, some two years after the constitution of 1890 went into effect, section 180 of that constitution effectually cut off the exemption claimed. We entertain no doubt whatever of the entire correctness of of this view, but if the doubt existed the same result must follow in accordance with the well settled principle that all doubt must be resolved in favor of the taxing power. This principle has never been more emphatically declared than in Yazoo & Mississippi Valley Railroad v. Thomas, 132 U. S. 174, in the following clear-cut language: "Exemptions from taxation are regarded as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the language used, construed strictissimi juris." It necessarily follows from these views that on this ground alone, standing by itself, apart from all other considerations in this case we must, and do hold the railroad company not entitled to the exemption claimed except in the particular hereinafter to be mentioned, and this independent ground of decision disposes of the case regardless of all other grounds. It will be observed that we have in reaching this conclusion treated consolidation not, as in itself, meaning necessarily that a new corporation must be created, but have allowed it the latitude of definition sometimes given it, very loosely and improperly, as we think, according to which consolidation may mean merger, the absorption of one corporation by another. Taking the word even in that sense as we have done thus far throughout this discussion, we have nevertheless found that the purpose of the legislature was such consolida-

tion as meant not merger but the creation of a new corporation and that the articles of consolidation together with the action of the stockholders and directors of the two companies show that what was actually effected was the creation of a new corporation. It is not necessary therefore to say that the term consolidation, ex vi termini, imports a creation of a new corporation, though in our judgment such is its true meaning as shown by the best considered cases. The loose phrase—"consolidation by merger"—is too vague and confusing to signify anything clearly; one might as well say merger by consolidation and that equivalency of phrase would give us the equation consolidation = merger, which manifestly is nonsense. The term consolidation where such phrase as consolidation by merger occurs, has as it seems to us, been carelessly confounded with the term amalgamation as used in England. Amalgamation in the English sense probably means about what merger does with us, but it is not consolidation in any proper sense of the term; it is in the interest of clearness of definition that consolidation should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation, and as we understand the decisions, this is what is known as the American Doctrine and the better view. Thus in Green's Brice's ultra vires, p. 538, Mr. Green says, summing up in a most learned note: "The term 'amalgamation' is seldom applied to corporations in this country. That which takes its place as much as any is "consolidation". But, though it is difficult accurately to define amalgamation as commonly used in English Law, it certainly has a wider meaning than consolidation has with us. Consolidation would, e. g., be inapplicable to a union of two or more companies. in such way that one of the original corporations only was continued in existence, while the other were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an amalgamation in England; but it *would not be a consolidation here.* In McMahan v. Morrison, 16 Ind., 172, a case frequently cited with approval in the later decisions, it was said, that the effect of the consolidation 'was a dissolution of the three corporations named, and at the same instant, the creation of a new corporation, with property, liabilities and stockholders derived from those then passing out of existence'. Similarly, in Lanman v. Lebanon, etc., Railroad Company, 30 Pa. St. 42, consolidation is said to amount to "A surrender of the old charters by the companies, the acceptance thereof by the legislature, and the formation of a new corporation out of such portions of the old as enter into the new". Where by the terms of the statute and deed, the first corporation was extinguished, the second only continued in existence, this was held not to be "an amalgamation or consolidation of the two corporations into one". Powell v. Northern Missouri R. R. Co., 42 Mo. 63. In the American view, therefore, it would seem that the *dissolution of all* the old corporations and the creation of *one new one* are *essential* to *consolidation*".

Mr. Chief Justice Fuller in Railroad Company v. Alsbrook, 146 U. S. 279, clearly has this view of consolidation. He says: "And although the transaction is called by the legislature, in the act of 1875, a consolidation, it amounted rather to a merger or an amalgamation, and need not be held to have resulted in a new corporation." Clearly distinguishing between consolidation on the one hand and merger or amalgamation on the other hand as two things in their essential nature wholly different from each other, as undoubtedly they are. So the Supreme Court of Arkansas distinctly hold in St. Louis v. Berry, 41 Ark., at p. 518, afterwards affirmed by

the U. S. Supreme Court, saying: "And in the absence of a contrary intention clearly expressed in the law authorizing it the legal effect of a consolidation is to extinguish the constituent companies and to create a new corporation with property, liabilities and stockholders derived from those then passing out of existence", citing

McMahan v. Morrison, 16 Ind. 172;

Lawman v. Lebanon R. R. Co., 30 Pa. St. 42;

Clearwater v. Merridith, 1 Wall. 25;

Shields v. State, 26 Id. 86;

Same case on error, 95 U. S. 319;

Central R. R. Co. v. Ga., 92 Id. 665; R. R. Co. v. Maine, 96 Id. 499;

Railroad Co. v. Ga., 98 Id. 359.

Mr. Justice Strong says in Central R. R. Co. v. Ga., 98 U. S., 360, that this view of consolidation accords with sound reason. And to the same effect is the Arkansas Milling v. Berry, 44 Ark., 22; Atlanta, etc., v. Ga. 637, 486. As before remarked, however, it is not necessary for us to hold that the true definition of the word consolidation is such union of two or more corporations as necessarily results in the creation of a new corporation; we merely remark upon what we think the true definition of the word should be held to be, in the interest of clearness and definiteness in legal phraseology, adding the authorities which restrict its signification as indicated above. But it is most earnestly insisted by learned counsel for the railroad company that the case of Railroad Company v. Lambert, 70 Miss., 781, is res adjudicata of this entire controversy. Except in the single particular to be hereinafter mentioned, this position is wholly untenable. The rule laid down by Mr. Justice Field of the United States Supreme Court in Cromwell v. Sac. County, reaffirmed in Keokuk v. Mo., supra, and in New Orleans v. Citizens Bank, 167 U. S., 397, and in So. P. R. R. Co. v. U. S., 168 U. S., at p. 48, is this, "that where the parties are the same and the subject matter and cause of action are the same, the estoppel extends not only to what was decided, but to all that might have been decided in that case; but where the parties are substantially the same but the cause of action different it only extends to what was necessarily involved and was actually decided in the first suit;" which is the doctrine laid down in the Duchess of Kington's case. The parties in the Lambert case were the Natchez, Jackson & Columbus Railroad Company and the sheriff of Adams county, and the subject matter or cause of action was the tax, state and county, on the part of the Natchez, Jackson & Columbus Railroad within Adams county; the exemption asserted was under the charter of the Natchez, Jackson & Columbus Railroad Company. In this case the parties are the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company on the one hand and the State Revenue Agent on the other, and the subject matter is State and County taxes of an entirely different railroad, the L., N. O. & T. railroad, and an exemption is claimed under the charter of the L., N. O. & T. Railroad Company, an entirely different charter. It is perfectly manifest therefore that neither the parties nor the subject matter are the same, except in the particular to be hereafter mentioned. The thing adjudged in the Lambert case was that State and County taxes were not due on that part of the Natchez, Jackson & Columbus Railroad Company lying within Adams county. It is true the principle of the decision would extend to the exemption of the whole property of the Natchez, Jackson & Columbus R. R. Co., but that was not the thing adjudged, and that feature of the decision is persuasive under the doctrine of stare decisis, and not binding as an estoppel, under the doctrine of res adjudicata. It is also true that to claim the benefit of res adjudicata as estoppel, in the strict and technical sense, it must be

pleaded or offered in evidence. It is further to be remarked that it is not the reason which a court gives for its decision which constitutes estoppel, but the thing it adjudges; this is well settled in Buckner v. Calote, 28 Miss., 432. The property adjudged by a court to a litigant is his thence forward under the doctrine of res adjudicata as a rule of property as against the parties in that same litigation; but the reasons which the court may give for the decision are thereafter simply persuasive under the doctrine of stare decisis and not in themselves to be invoked as the estoppel. It is a mere confusion of thought to blend these two wholly different principles, underlying these legal doctrines, and thus practically treating them as the same. Nor are the taxes of any one year, the same cause of action as the taxes of any other year, in the only proper technical signification to be given to the term res adjudicata. It is so held by the United States Supreme Court in Keokuk v. Mo., supra, and in Phoenix Ins. Co. v. Tennessee, 161 U. S., at p. 186. A decision for the taxes of any one year may be invoked under the doctrine of stare decisis, where the taxes of any other year are involved under the same claim. But certainly NEVER, on any clear thinking or correct reasoning, under the doctrine of res adjudicata.

On this very subject the Supreme Court of Iowa said, in the City of Davenport v. the C., R. T. & P. R. R. Co., 38 Iowa, p. 639-640: "Each year's taxes constitute a distinct and separate cause of action, and the determination of the matters, involved in the injunction, reached no further than the taxes for the years then in question. The cases are unlike those where two causes of action, (as two promissory notes) forming the subject matter of successive actions between the same parties both growing out of the same transaction, in which a defense set up in the first suit and held good will conclude the parties in the second.

But the taxes of separate years do not in any just sense grow out of the same transaction. They are like distinct claims on two different promissory notes, made from two distinct and separate though similar transactions between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties. In support of these views see the following cases"; citing twelve cases, Mr. Justice White says in New Orleans v. Bank, 167 U. S., p. , that this was practically overruled in Goodenow v. Litchfield, 59 Iowa. But Seevers, chief justice in that case says, at p. 236, that the cases are not in conflict. And Rothbroch, judge, in delivering the opinion of the court in the Goodenow case says at p. 234: "That (the case in 38 Iowa) was a direct proceeding by the *taxing power to collect its revenue*, and it may well be questioned whether *any decree* could operate *upon future assessments and levies*" —the very principle announced in Keokuk v. Missouri, 152 U. S.

It will, however, be distinctly observed, and we direct emphatic attention to this statement, that whether the decision for taxes of one year is res adjudicata as to taxes for another year preferred under the same claims as held in New Orleans v. Citizens' Bank, 167, 397, is wholly immaterial here, since the parties to this litigation are not the same with the parties to the litigation in the Lambert case, except perhaps as hereafter indicated. There is therefore no res adjudicata arising out of the Lambert case, except as will be indicated; and that exception is this: perhaps the State Revenue Agent as to the taxes, state and county, on the property of the Natchez, Jackson & Columbus Railroad Co. in Adams county, for the year 1892, may be regarded properly and substantially as the same

party with the sheriff of Adams county, and the Natchez, Jackson & Columbus Railroad Co., as to the same taxes on the same part of its property may properly be regarded as substatially the same party with the Yazoo & Miss. Valley Railroad Co., into which the property of the Natchez, Jackson & Columbus Railroad Co. has been integrated. Substantially, in this small particular, as to the state and county taxes for the year 1892 on that part of the property of the Natchez, Jackson & Columbus Railroad Co. lying in Adams county, the parties may be said to be the same and the cause of action the same; and we hold accordingly that as to that the Railroad Company is entitled to claim the exemption under the Lambert case as res adjudicata. Except as to this a one there is clearly, as we think, no right to invoke the Lambert case as res adjudicata for the reason that the parties are not the same without reference to other considerations. And let it be further specially noted that the Lambert case went off on demurrer and the evidence in this case was not before the court. It is well said by the Supreme Court of the United States in Keokuk v. Mo., 152 U. S. 313, in an opinion of unusual clearness and power that "it is not to be tolerated that the State should be forever debarred of its taxes by an erroneous decision," p. 316. But it is said if the Lambert case is not res adjudicata it should control this case under the doctrine of stare decisis. There is one view of the Lambert case which authorizes the appeal to the doctrine of stare decisia; it did distinctly decide that what occurred between these companies was merger and not consolidation, and that no new corporation was created thereby, applying the principles of the Railroad Company v. Maine, 96 U. S. 499, to the facts of this case which are, in our judgment, wholly different from the facts in the Maine case. It did not decide of course—holding that the case was one of merger—whether section 180 of the Constitution of 1890 would have cut off the exemption had there been a consolidation creating a new corporation. Holding, that it was a case of mere merger, the court very naturally held that section 181 of the Constitution of 1890 had no effect on the exemption claimed, *in that view*. The court most emphatically did *not* decide that, had there been a consolidation resulting in the creation of a new corporation after the Constitution of 1890 went into effect, such new corporation could claim that an exemption belonging to one of its constituents prior to that constitution, as the property of the absorbed company alone, was continued by virtue of section 181. There is no process of interpretation by which the decision in the Lambert case can be so distorted as to mean any such thing. The court proceeded throughout upon the proposition that it being a mere case of merger, the Yazoo & Miss. Valley Railroad Co. absorbing the L. N. O. & T. Railroad, section 181 had no effect upon the exemption, and that such exemption passed to the the Y. & M. V. Co. so far as the property of the Natchez, Jackson & Columbus Railroad Co. was concerned. If it had *been* a mere case of merger, as held by the court, we think it clear, as hereinbefore pointed out, that *that* exemption did not pass, and that the court was in error in so holding, because of the well settled proposition hereinbefore stated and supported by the authorities that under the *general law* alone, without reference to the constitution, an exemption will not pass in a case of merger to the absorbing company which attached to the property of the company merged alone, unless the legislation authorizing in such case merger either *expressly* declared that the exemption shall pass, or used the word "immunity," or an equivalent word; it was correct in fact to say

that the exemption of the property of the Natchez, Jackson & Columbus Railroad Co. passed to the L. N. O. & T. Co. by virtue of the word "immunities" used in the Act of 1890, authorizing a sale or consolidation of the Natchez, Jackson & Columbus Railroad Company with the L. N. O. & T. Railroad (laws of 1890, p. 675) provided always that exemption was *legal* in its origin, the validity of which exemption was not contested but conceded in the Lambert case, but which was clearly invalid as we shall show later in this opinion. The power of the word "immunities" in said act to pass such exemption to the L. N. O. & T. Railroad under said Act of 1890 was exhausted by that consolidation, and had no virtue to carry that exemption into the new company, the present Y. & M. V. Railroad Company, resulting from the consolidation, even had Section 180 of the Constitution of 1890 not been adopted. We have most carefully considered the Lambert case, giving all due weight to the doctrine of stare decisis, and as to the two propositions that what occurred here was merger and not consolidation creating a new corporation, and that the exemption consequently of the Natchez, Jackson & Columbus Railroad properly passed to the Y. & M. V. Railroad Company, even in the view of merger under the *legislation alone*, we hereby expressly overrule the Lambert case. Exemptions, where proper, should be expressly granted—not stealthily referenced in.

Second. We turn now to a second ground of decision, wholly independent of, and disconnected from, all that we have said in the first ground, from which we think the same result must follow. The exemption asserted here is that contained in the 21st section of the Mobile & Northwestern Railroad Company's charter, which is as follows:

"Sec. 21.—Be it further enacted, That in consideration of the construction of the railroads provided for herein, and of the great benefit which the state will receive in the development of its agricultural resources by means of said Railroads as works of internal improvement, and also of the increased value which will thereby be added to the property of the State, thus enabling the State to greatly increase its revenue without additional and burdensome taxation upon the people, the State hereby agrees with said Company (*and which agreement is irrepealable*), that all taxes to which said Company shall be subject for the period of thirty years are hereby appropriated and set apart, and shall be applied to the payment and debts and liabilities which the said Company may have incurred in the construction of said road, or for money borrowed by said Company upon lands or otherwise, to be used in constructing the same: and it shall be the duty of the Tax Collector in every county, in each and every year, to give to said Company a receipt in full for the amount of said taxes upon receiving from said Company an affidavit, made by the President or Cashier of said Company, that the amount of said taxes have actually and in good faith been paid and applied by said company during the year in payment of the debts incurred, or money borrowed as aforesaid, and which receipt so given shall be in full of all taxes, county, state and municipal, to which said Company shall be subject; provided, however, that whenever the profits of said Company shall enable it to declare and pay to the stockholders an annual dividend of eight per cent. upon its capital stock over and above the payment of its debts and liabilities, then the appropriation of the taxes aforesaid shall cease, and said taxes shall be paid by said Company to the Tax Collector, to be by him paid over as required by law."

That act was passed in 1870, after the Constitution of 1869, Sec. 13, Art. 12, and Sec. 20, Art. 12, had been

adopted, and it is expressly decided in Lambert's case, 70 Miss., p. 786 and 789, that this was "a thin disguise to evade constitutional restraint apprehended to be contained in said section 13, article 12, of said constitution," and the Lambert case further declares—what is manifest—that the pretended exemption was irrepealable on the face of said section. Unquestionably said 21st section did provide for an *irrepealable exemption on its face*, and we hold it, *therefore*, to have been in violation of section 13, article 12, and section 20, article 12, of the Constitution of 1869.

The case of Mississippi Mills v. Cook 56 Miss. p. 40 expressly held that the legislature had no power to grant an irrepealable exemption and under that decision, the exemption claimed under this section is manifestly unconstitutional. Section 13, article 12 of the constitution of 1869 is in these words; "The property of all corporations for pecuniary profit shall be subject to taxation the same as that of individuals." Section 20 is in these words; "Taxation shall be equal and uniform throughout the State; all property shall be taxed in proportion to its value to be ascertained as directed by law." Mississippi Mills v. Cook decided that the property of private corporations for pecuniary profit was and should remain subject to taxation; it expressly held that while an exemption might be granted, yet it might at any time be repealed by the legislature, and further that no exemption could be granted to any private corporation for pecuniary profit by a special act extending a special exemption to that special corporation alone; but that in order to make any such exemption valid it must be extended to all corporations for pecuniary profit of the same class and in the same situation. And the precise exemption asserted in that case was asserted distinctly under the Acts of April, 1872, and 17th of April 1873 amendatory thereof set out at pages 42-43 of 56 Miss. The Mississippi Mills did not claim that it had a valid exemption by virtue of a special Act granting such special exemption to the Mississippi Mills alone, but that it had such exemption in common with all other factories similarly situated by virtue of said general law. The exemption set up here under the 21st section of the Mobile and Northwestern charter is wholly different. The claim here is that this particular railroad is entitled to this special exemption which it is conceded is not now, and never was, extended to all other railroads similarly situated in this state. And further this exemption is irrepealable on its face, and the Mississippi Mills case decided no irrepealable exemption was constitutional; it is certainly obvious from these considerations alone that the Mississippi Mills v. Cook is no authority to sustain the exemption set up here. It is further clear that the constitutionality, under the constitution of 1869, of a legislative grant of exemption to private corporations for pecuniary profit if it embraced all of the same class,—the property of individuals being at the same time taxed—was not argued, considered or decided in Mississippi Mills v. Cook, but was conceded by the attorney general and the judges who wrote the majority opinions. One of the vices of the decision in Mississippi Mills v. Cook is that it did not hold that all the property of private corporations for pecuniary profit was required to be taxed by the terms of the constitution, sections 13 and 20, article 12, just as, and when, the property of individuals was. Instead of doing this the court decided that all such property was free from taxation unless the legislature expressly subjected it to taxation, even though the property of private individuals was taxed, inverting the rule of the constitution. It was certainly an idle performance to declare, as the court did declare, that the whole effect of

the constitutional provision was to render the property of private corporations for pecuniary profit liable to taxation; that everybody knew: and to so limit the constitutional declaration was to emasculate it. More than 35 years had intervened between the previous constitution of the State and the constitution of 1869: when that previous constitution was adopted—in 1832—the State was young, and had had little experience with the grasping demands of corporations for grants of exclusive privileges; but the experience of more than 35 years had taught it wisdom in this regard, wisdom learned long prior by older commonwealths like California and Iowa, from the constitution of which latter state the provisions of the constitution of 1869 in question were doubtless borrowed; and so section 13 of article 12 was put in the organic law of the land, beyond the reach of legislative control, for the express purpose of formulating a fundamentally great line of public policy prohibiting any difference in the exercise of the taxing power between the property of individuals and the property of private corporations for pecuniary profit. The court in Mississippi Mills v. Cook at pp. 51-52 looked too narrowly at the mere word "Subject," it should have taken broadly the whole section into view and deduced from all its terms the meaning of the provision. Judge Campbell in Beck v. Allen, 58 Miss., 177, most wisely said: "Subtlety and refinement and astuteness are not admissible to explain away the expression of the sovereign will. The framers of the constitution and the people who adopted it must be understood to have intended the words employed in that sense most likely to arise from them, *on first reading them.*" This is the doctrine announced by Cooley & Story and our construction of the meaning of section 13, to-wit: that it required the property of private corporations for pecuniary profit to be taxed just as when—"the same as"—the property of individuals, so that one would not be exempt and the other taxed, is the identical construction placed upon the same words by the Supreme Court of the United States, of Alabama, Arkansas, California, Florida and Iowa. We prefer now to distinctly align ourselves with the Supreme Court of the United States on this important question, and overrule Mississippi Mills v. Cook in so far as it held that the property of private corporations for pecuniary profit was not, by the constitution of 1869, sections 13 and 20, of article 12, expressly directed to be taxed just as the property of individuals. The decisions of the United States Supreme Court to which we refer are as follows: Louisville v. Palmes, 109 U. S., 248; St. Louis v. Berry, 113 U. S., 475; Schurz v. Cook, 148 U. S., 408; Keokuk v. Mo., 152 U. S. 303, and 310-312.

The decisions of the State Supreme Courts to which we have referred are as follows: 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231, which collates the constitutions of Wisconsin, Missouri, Illinois, Kansas, Mississippi, Alabama, Arkansas and Louisiana. In 53 Ala., 570, Mobile v. Stonewall, Judge Brickell in a most masterly opinion says: "The constitutional provision supposed to have been offended by the enactments under which the appellee claims immunity from the taxation the appellant seeks to recover, has a history which must be consulted, in determining its just interpretation. Its purpose was not an adaptation only of the organic law to the changed political condition of the people, and to conform it to the new relations springing from the amendments of the Federal Constitution, and the conditions imposed by congressional enactment. It was intended also to cure defects time had developed in former constitutions—to narrow and restrain legislative power in the instances experience had shown it most liable to abuse. Under

former constitutions the taxing power was not defined, qualified or restrained by any other provision than the simple declaration: "All lands liable to taxation in this state shall be taxed in proportion to their value." There can not be a just interpretation—an interpretation which will consummate the intent of the people in the adoption of these and other constitutional provisions—which is not deduced, not only from their *language*, but from their *history*—from the causes to which they owe *origin*—the *mischief* they were intended to *remedy*. In respect to the constitution of the United States, it is said "the safest rule of interpretation is to look to the nature and objects of the particular powers, duties and rights, with all the lights and aid of cotemporary history, and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed." In the creation of the greater part, if not all, of the private moneyed or commercial corporations which were created prior to 1861, a commutation of taxation was a prominent feature of the charter. Entire or partial exemption from taxation temporarily has been frequently granted corporations formed to pursue branches of industry, the encouragement of which it was believed a wise public policy required. All exemptions from taxation necessarily increase the burdens imposed on the property not exempt, and are directly injurious to the taxpayer. The incidental benefits which it is supposed may result to him, in common with the community at large are speculative, and not often a compensation for the immediate injury sustained. Invidious exemptions or discriminations, by which the property of an individual, or of a corporation, is relieved from bearing a just proportion of the common burden taxation is intended to discharge, are violative of the equality of right of the citizen, which is a fundamental principle of our institutions. To prevent any exemption or discrimination in favor of corporations, to subject their property to the same rate of taxation to which the property of individuals of the same kind is subject, is the purpose of the constitutional provision clearly expressed: "The property of corporations now existing, or hereafter created, shall forever be subject to taxation, the same as property of individuals," etc. The argument of appellee, that it was intended only to reserve to the legislature the *power of subjecting* corporate property to the taxation imposed on individuals, and to avoid the introduction into charters of irrepealable exemptions, or discriminations, *can not be supported*. Reading these constitutional provisions in the light of their history, and with a due regard to the words in which they are expressed, it is impossible for us to doubt that it was not competent for the general assembly, in the imposition of taxes, to distinguish or discriminate in favor of corporate property subject to taxation. If property of a particular kind is subjected to taxation, and owned by a corporation it must bear the rate of taxation imposed on individuals. While the constitution inhibits the exemption or discrimination in favor of corporations, it equally inhibits a discrimination against them. Equality in bearing a common burden, which is natural right and equity, is secured alike to the corporation and to the citizen.

The constitution of Iowa contains a provision identical in meaning if not in words, with the provision of the constitution of 1868, under consideration. It reads; "The property of all corporations for pecuniary profit shall be subject to taxation, the same as that of individuals." In The City of Davenport v. C. R. J. & P. R. R. Co., 38 Iowa, 633, it was the subject of construction, and was declared mandatory, requiring the legislature to pro-

vide for taxation of the property of corporations for pecuniary profit the same as that of individuals. A statute releasing railroad companies from certain taxation to which individuals were subject was declared violative of it. The Court says: "What are we to understand to be intended by the language 'the same as that of individuals?' We need not determine whether this language requires that corporate property shall be taxed in the same manner as that of natural persons. It seems, however, quite clear that it was intended by this language to require the legislature to impose the burdens of taxation upon the property of corporations for pecuniary profit, the same as, or equally with, that of individuals; that each shall be taxed for the same objects, and in the same degree, so that individuals shall not be required to pay any taxes on their property which have not also been assessed and laid upon the property of corporations of the class named, or in any greater proportion. When the legislature provides for taxing the property of individuals, this clause of the constitution requires it to tax the property of corporations for pecuniary profit to the same extent and for the same purposes. If the property of individuals be taxed for state, county, school, and municipal purposes, the property of this class of corporations must be subjected to the same taxes, and at the same rates. *The one can not be exempt, and the other liable.*"

It will thus be seen that on the particular holding of Mississippi Mills v. Cook which we now overrule this court stood absolutely alone; its decision in direct conflict with all the decisions we have just above cited. So much for the mere inaccuracy of that holding.

We turn now to the proposition that the overruling of Mississippi Mills v. Cook as to the holding which we have particularized overturns a rule of property and destroys a vested right on which the railroad company has a right to rely. The alleged vested right is this: that the 21st section of the Mobile & North Western charter containing this alleged exemption has been declared repeatedly in this state by the Miss. Mills v. Cook and other cases down to and including the Lambert case, not to have been violative of the constitution of 1869. This statement is wholly inaccurate and is the result alone of a careless study of the decisions of this court. There are some primary rules on the subject of stare decisis to which we shall first call attention, they are formulated by the Supreme Court of the United States as follows:

1. The court is not bound by expressions in former decisions on points which were not contested. Cross v. Burk, 146 U. S. 86.

2. The doctrine of stare decisis can not be invoked in favor of decisions on former statutes which were merely similar to but not identical with the one under review. Wood v. Brady, 150 U. S. p. 20. This rule was relied upon by the Supreme Court of the United States in the celebrated Income-tax case. Pollock v. Farmers Loan & Trust Co., 157, 574, the court pointing out that whilst the language of former decisions was sometimes very broad, yet the exact points involved in all former decisions were different.

3. It is expressly held that a decision that a statute constitutes a contract and that an Act repealing it is void is not an estoppel to a subsequent decision holding that the former *statute itself* is *unconstitutional*, and this is the exact case now before us. Boyd v. Ala. 94 U. S. 645.

Keeping these principles steadily in mind a review of the decisions of this court will show that no charter identical with that of the Natchez, Jackson & Columbus R. R. was ever passed on in this State until January, 1891, a period subsequent to the purchase of that road by the L., N. O. & T. Rail-

road Company; from which it necessarily follows that THAT purchase could not have been made on the faith of that decision rendered in 1891. It will further be seen that the question whether the 21st section of the charter of the Mobile & North Western Railroad Company violated the constitution of 1869, as we hold it did, has never been passed on in this State up to this time. The cases in this State relied on to show the opposite of these views are as follows: Mississippi Mills v. Cook, 56 Miss. p. 40, decided at the April term, 1878, where the sole question was, *according to the opinion*, whether exemption under general law was repealable or irrepealable; the constitutionality of the exemption was not argued or decided. But much more than this is to be said about Mississippi Mills v. Cook. An examination of the original record in Mississippi Mills v. Cook shows that it was a bill for injunction by the Mississippi Mills v. Cook, tax collector averring the establishment of its factory after and on the faith of the acts of 1872-1873 granting an exemption in consideration of the construction of factories, etc., and that Cook was willing to accept the affidavit for the taxes of the mill proper, but refused to accept the affidavit for taxes on outlying land, and the bill prayed an injunction v. Cook prohibiting the sale of its property for these taxes assessed on outlying lands on the ground that they were essentially part of the Mill property for wood, etc. The bill averred that under the Act of 1877 Cook himself insisted on collecting these taxes on these lands; there was a general demurrer to the bill sustained by the court below and the bill was dismissed, and an appeal taken to the Supreme Court. The sole question involved, therefore, as thus clearly shown *by the record itself*, arose under the general exemption law applicable to all the factories of the class described, and not to a special grant a special exemption to a particular corporation. All, therefore, that appears in the opinion beyond what would relate to the right to collect these taxes on outlying land, *is mere dictum;* for in determining what has been *adjudged* courts look to the decree and the record, and are not controlled by the mere opinion. Herman on res adjudicata p. 470. Another striking difference between the exemption claimed in that case and in this, is that the Act of 1872, under which that exemption was asserted, did not attempt to perserve exemptions granted to corporations or individuals establishing factories under its provision from legislative repeal; whereas, in the Act of 1870 this 21st section, is declared in the Lambert case a miserable attempt to evade the constitution of 1869 and secure an irrepealable grant of exemption, and that, too, to a particular corporation. The next case is McCulloch v. Stone, 64 Miss., 378, decided in 1886, in which the only question involved was whether outlying lands of a railroad company were embraced in an exemption contained in that charter, the court holding that they were not. The next case is the Yazoo & Miss. Valley Railroad Company v. Thomas, 65 Miss., 553, decided in 1887, in which the only question involved was whether the property was exempt before completion of the railroad to the Mississippi river. The charter provided for a 20 years' exemption after such completion, the court holding that it was not exempt. The next case is the Vicksburg Bank v. Worrell, 67 Miss., p. 47 decided at October term, 1889, where the legislature had provided for what the court calls a privilege tax on all banks in the State, and the question was whether this violated Article 12, section 20, of the constitution of 1869, providing that taxation shall be equal and uniform and in proportion to value, and the court held that it did not. The next case is Attala County v. Kelly, 68 Miss., 44, decided at October term, 1890, a case in

which the bank had paid in advance a commutation tax of $1,000 called by the court a privilege tax, and the legislature in the same year repealed that law and provided for an advalorem tax. The court held it was liable to the advalorem tax notwithstanding it had paid the commutation tax, and that was the only point involved. The next case is the Louisville, New Orleans & Texas v. Taylor, 68, Miss., 361, decided at October term, 1890, not actually decided, however, till January 26, 1891, as the records of this court show. No question was raised in that case by counsel or the court as to the constitutionality of the exemption contained in such section 21 of the M. & Northwestern charter, the sole question involved was the right to exemption of a gravel pit claimed by the L., N. O. & T. Railroad Company under the charter of the Vicksburg, Pensacola & Ship Island Railroad Company,—afterwards the M. & Sh. I. R. R. Co.—which never was a part of the L., N. O. &. T. Railroad Company, and the court decided that the exemption should be allowed under that charter!! This was a most extraordinary mistake, for it is now conceded by counsel for the railroad and everybody else that the charter of the Vicksburg, Pensacola & Ship Island Railroad Company, afterwards the M. & Sh. I. R. R. Co., had nothing on earth to do with the charters of the L., N. O. & T. Railroad Company nor was that railroad any constituent of the L., N. O. & T. Railroad Company. It appears that the court was led into this mistake by an assumption of counsel to that effect in the case. Certain it is that it was a tremendous mistake of fact and one against the sovereign right of taxation. It is perfectly obvious that this case is wholly fictitious and is of no authority for any purpose. It is further to be observed, however, that inasmuch as the L., N. O. & T. Railroad Company purchased the Natchez, Jackson & Columbus Railroad Company in March, 1890, and the decision in the Taylor case was not rendered until Junary 26, 1891, the L., N. O. & T. Railroad Company could not possibly have made said purchase on the faith of the Taylor case, nor on the faith of section 181 of the Constitution of 1890, because that was not adopted until November 1st, 1890, and then continued only legal exemptions to corporations retaining the precise identity they had before the constitution was adopted. The next case is State v. Simmons, 68 Miss. 361, decided at October term, 1890, which involved the mere question as to whether the capital stock was exempt under the charter and the court held that it was not. The next case, and the last, is the Natchez, Jackson & Columbus Railroad Co. v. Lambert, 70 Miss. 779, decided at the March term 1893, and the question contested in that case was whether the exemption of the Natchez, Jackson & Columbus Railroad Co. v. Lambert, which had been purchased by the L. N. O. & T. Railroad Company, passed to the Y. & M. V. Railroad Co., the court deciding that it did. The question whether that exemption violated the constitution of 1869 was not argued by counsel or considered or decided by the court. These are the cases on which so much reliance has been placed to show a vested right—a rule of property—and it is perfectly manifest that in *none* of them was it proper to have decided upon the constitutionality of this section 21, unless in the Taylor case and the Lambert case, because in none of the other cases was that question *involved*, and they could all have been decided without reference to that question, and consequently, under the authority of Pollock v. Trust Co., 157 U. S., and Boyd v. Ala., 194 U. S., supra, they are not binding, under the doctrine of state decisis even, on this court in this case. And whilst the question of the constitutionality of said section 21 was in-

volved in the Taylor case and the Lambert case, the constitutionality of the exemption was *conceded* on all hands, and *not contested*, and not having been contested, these cases as held in Cross v. Burk, 146 U. S., supra, are of no force on us in this case under the doctrine of stare decisis. It will thus be clearly seen (1) that the exemption claimed in the Miss. Mills v. Cook was one claimed under a general law applicable to all the factories in the State of the same class; whereas, the exemption claimed here, to-wit., the 21st section of the charter of the Mobile & Northwestern Railroad Co., is an exemption attempted to be granted to this special corporation, and not to all the other railroads in the State, a special privilege under a special charter to a special corporation. (2). That the Miss. Mills had established their factory after the passage of the Act of 1872-1873, on the faith of those acts as a rule of property; whereas, the L. N. O. & T. Railway Company never came into existence, as admitted by counsel for the railroad until the 12th day of August, 1884. by the consolidation of the Baton Rouge Railroad and the Vicksburg and Memphis Railroad, after the construction of the road had been practically finished in July, 1884. (3). That the exemption claimed in Miss Mills v. Cook had no irrepealable feature whereas the exemption set up under the said 21st section is on its face irrepealable, and was so judicially declared to be, in the *Lambert case itself*. (4). That the L. N. O. & T. Railroad Co. claims under charters granted in 1882 and 1884, asserting as its exemption this 21st section, the unconstitutionality of which, as violative of section 13 of article 12 of the constitution of 1869, was not only *not* considered, argued, or decided, in Miss. Mills v. Cook, but which, by virtue of its irrepealable feature and its special grant of an exclusive privilege to a special corporation, would have been *condemned by the reasoning of that very case*. (5). And not only is it true that the particular exemption claimed here, under this 21st section, was not argued, or decided, in Miss. Mills v. Cook, but no other decision was ever rendered in this State in which the constitutionality of this 21st section was *even involved*, until McCulloch v. Stone, decided in 1886, four years *after* the grant of the charter of the L. N. O. & T. Railroad Co. (6). From which it necessarily follows, that *that* road was not built on the faith of any decision ever rendered in this State up to the time of the grant of its charter, which *even involved* the constitutionality of said 21st section, and that the claim that it was organized or built on the faith of such decision operating as a rule of property *is utterly unfounded and absurd!* (7). That the Taylor case was neither more nor less than a fictitious case which misled the court by the misstatement of fact that the Vicksburg, Pensacola & Ship Island Railroad, afterwards Gulf & Ship Island Railroad, was one of the constituent members of the L. N. O. & T. Railroad, and its charter was a constituent charter of that railroad, and that the Taylor case is authority for nothing. (8). That the Lambert case was decided at the March term 1893, ELEVEN YEARS after, not before, the grant of the charter of the L. N. O. & T. R. R. Co. And it is hence utterly incomprehensible to the legal mind how anybody could invoke that case under the doctrine of stare decisis as affording a rule of property to a company constructed under a charter granted BEFORE it was rendered. Such claim becomes more incomprehensible still when the further facts are recalled that the consolidation of the L. N. O. & T. and Y. & M. V. into the present Y. & M. V. R. R. Co. took place October 24, 1892, long BEFORE the decision in the Lambert case."

Let us get out of the realm of idle and reckless assertion into the realm

of fact, and inquire more particularly and accurately exactly what was decided, even in the opinion of the court, which went far beyond the record, in the Miss. Mills v. Cook. The vice of that decision is, that it looked exclusively to the word "subject" in section 13, article 12, and failed to give force and effect to the words, "the same as that of individuals." When we say that the court's construction of the word "subject" attributed to it some supposed magical effect, we are simply reiterating the language of Chalmers, Justice. He said, p. 5956 Miss.: "I find no such *magic* as my colleague in the words 'shall be subject to taxation the same as that of individuals.' To me they have no meaning other than that which would be conveyed by the equivalent phrases shall be treated or shall be dealt with the same as that of individuals, or shall be liable to taxation the same as that of individuals. This, and many similar phrases, which might perhaps be suggested convey one and the same idea, namely: That the law-giver in the imposition of taxes shall *know no difference between the property of individuals* and *that of corporations for pecuniary profit.*" The opinion of the court declares as its gist that section 13 was not mandatory upon the legislature to tax the property of private corporations for pecuniary profit whenever the property of individuals was taxed. It distinctly put the property of such private corporations as to the power to tax them, or exempt them, in a class by themselves distinct from the class of individuals. In other words, it held that although the property of individuals might be taxed, yet the property of such corporations might be at the same time exempted by the legislature from taxation; provided, such exemption extended to all corporations of the same class in the State. We think it is perfectly manifest that the language "the same as the property of individuals" imperatively commanded the legislature whenever they tax the property of private individuals, to tax also the property of such corporations, and under the same rules of equality and uniformity. It was well said by Campbell, Justice, that this provision of section 13 "sprang from the experience that corporations were in the habit of asking and obtaining legislative exemption from liability to taxation." That experience the State had acquired in the 35 years lapsing between the constitution of 182 and the constitution of 1869, and that experience was wisely availed of to put an end to the grant of exclusive privileges to such corporations. It marked a new era in the history of corporate taxation in this State; it laid down a fundamental new line of great public policy, one that will be found essential to the preservation of the rights of the people, as is abundantly attested by the experience of older States dealing with such corporations. It is that feature of the decision thus holding that this section 13 merely permitted the taxation of such corporations, but did not require that taxation whenever the property of individuals was taxed, and in just the same manner, in all respects as the property of private individuals was taxed, which we now condemn and overrule. In no other respect do we interfere with the decision in that case. That case decided, and properly decided, that under the constitution of 1869 the legislature had the power to select for exemption from taxation certain designated kinds of property, such as the agricultural implements of farmers, the tools of the mechanics, etc., etc. Such exemption of particular kinds of property, for reasons of public policy, the constitution allowed the legislature to grant, and when granted, it applied to such property, whether owned by individuals or such corporations. And to permit such exemptions was perfectly

consistent with holding that said section mandatorily required the legislature to tax the property of such corporations whenever and just as it taxed the property of individuals. The vice of the holding of the court was in disregarding and repudiating the correlation by the constitution of the property of such corporations and the property of private individuals in the same category as to the *right* to tax and the *duty* to tax, and in declaring that under that section the legislature might put into operation a scheme of taxation which taxed property of all the private individuals in the state, and at the *same time*, at the will of the legislature exempt all property of such corporations from any taxation whatever. The constitution plainly and clearly *yoked together indissolubly* the property of such corporations and the property of individuals and subjected both alike to the same taxation to be imposed under the same rules of equality, or uniformity. The legislature might not exempt all the property of private corporations for pecuniary profit and tax all the propey of private individuals, but it might exempt cerain selected kinds of property in pursuance of a wise public policy, whether that property belonged to such corporations or to private individuals. One other observation. The case before us most emphatically does NOT present a claim to exemption under a charter identical with the charter in the Miss. Mills v. Cook, nor the case of any corporation which has acted on the faith of a decision construing a charter identical with the charter in the case of Miss. Mills v. Cook. and which might thus be said to constitute, for such corporation, acting on it and investing its capital on it, a rule of property. It will be time enough to decide that precise question when that question shall be presented. Whence did we get section 13 Article 12, of the constitution of 1869 ? It is said in the Miss. Mills v. Cook that we get it from the constitution of Iowa; the clauses in the constitution of Iowa and constitution of Mississippi 1869 are identical on this subject, and the Supreme Court of Iowa in the City of Davenport v. Railroad Co., 36 Iowa 635 and the City of Dubuque v. Illinois Central R. R. 39 Iowa, expressly decided that this identical section prohibited the legislature from exempting the property of corporations from the same taxes imposed on the property of individuals, and that the property of corporations must be taxed whenever that of individuals was taxed. The constitution of Alabama in Mobile v. Stonewall Ins. Co. 53 Ala. 70 declared that the provision was in itself self-executing without the aid, in fact in restraint of, legistive power,—subjecting corporate property to the taxation imposd on individuals, and expressly declared further that if property of a particular kind is subjected to taxation and owned by a corporation, it must bear the rate of taxation imposed on individuals.

The constitution of California contains an identical provision, and in the case of People v. McCrary decided at January term 1868, the Supreme Court of California announced the same construction held in Iowa and Alabama expressly overruling early decisions to the contrary, just as we do here. The constitutions of Arkansas and Florida contain similar provisions and the Supreme Courts of those States announced the same construction which we here announce. When therefore section 13 of the constitution of 1869 was adopted in this state it was written in the organic law of our land, bringing with it the *same meaning precisely*, under well settled rules of construction, which it had in the State *from which it came here*. And the same construction was unamously approved by the Supreme Court of the United States in four concurring de-

cisions rendered in November 1883, March 1885, April 1893 and March 1894 towit: Louisville etc. v. Palmer, 109 U. S. 248-254. St. Louis etc. v. Berry, 113 U. S. 475. Schurz v. Cook, 148 U. S. 408. Keokuk v. Mo., 152 U. S. 303-304 and 310-312.

In overruling this feature of the decision in Mississippi Mills v. Cook, therefore, we were announcing a rule of construction supported by four decisions of the United States Supreme Court and by the decisions of five State Supreme Courts, as against a rule of construction announced in *no case in this Union except Mississippi Mills v. Cook.*

We have all proper respect for the doctrine of stare decisis, but it is a doctrine not inflexible and departed from over and over by the wisest courts in proper cases.

And if the doctrine of stare decisis can be disregarded in proper cases, where the question is one merely of *property rights* between *individuals*, how much stronger is the reason for disregarding it when, so to do, results as herein merely restoring to a sovereign State the right to tax corporations and make them bear their just share of the burdens of that government whose protection they so constantly and persistently invoke. This distinction is not one of our invention. It is well settled in the law and it was voiced in words which we quote to approve by Chief Justice George in Lombard v. Lombard, 57 Miss., p. 177, who said: "Speaking for myself alone, I would say that on *constitutional* questions, where the former decision refused a right reserved to individuals as against the power of the government, or where it impaired the powers of the people or their representatives to prevent maladministration by their officers and agents, or sanctioned an *alienation by the legislature of powers conferred for the public good*, I should feel little hesitation in departing from it, when satisfied of its incorrectness." And in Beck v. Allen, 58 Miss. 173, Judge George delivering the opinion of the court, overruled two previous decisions on the same point, justifying departure from the rule of stare decisis, by the very distinction here referred to, the case being one involving the taxing power. In concluding this ground of decision we repeat that it is wholly independent of the first ground of decision hereinbefore elaborated, and whether we are right or wrong in the view announced in this second ground, the exemption must be denied looking to the first alone.

In our summary of the holdings in this case, we said there were other views leading to the same conclusion, which we might embrace in the opinion. We proceed to notice these. We come now to a third ground of decision, and that is this: that the exemption claimed here under said 21st section of the Mobile and North Western charter whether applied to the property of the Natchez, Jackson & Columbus Railroad alone, or to the other property of the L., N. O. & T. R. R. Co. has been repealed by legislation, certainly since the code of 1892 went into effect. It was declared in the Lambert case, 70 Miss. 787, through Judge Campbell,—the author of the code of 1880,—that by the code of 1880, each railroad in this State was subjected to taxation. That code, therefore repealed all railroad exemptions then existing. The Lambert case further held that by the act of 1884, p. 29, the exemption of the Natchez, Jackson & Columbus Railroad was restored, and that by the act of 1890, p. 12, if it then existed, it was continued. An examination of all the statutes on the subject, which are as follows: Code of 1880, Sec. 596-606, inclusive, and Secs. 607 and 608; Acts of 1886, Sec. 6, p. 23; Acts of 1888, p. 49; Acts of 1890, p. 12; Code of 1892, Secs. 3379 and 3875, and Sec. 3744;—will show that the scheme propounded by the legislature was, up to the code of 1892, this: That railroad companies should

pay ad valorem taxes unless they should accept the conditional exemption provided in the privilege tax law in lieu of the ad valorem tax and manifest their acceptance of the law providing this conditional exemption from ad valorem taxation by putting such acceptance in writing and annually paying the privilege tax specified. The provisions of law respecting such conditional exemption from advalorem taxation by accepting the privilege tax imposed in lieu thereof and paying it run side by side through all the legislation from the code of 1880 to the code of 1892. The scheme was that advalorem taxes should be paid by all railroads in the state, but that any railroad should be exempt from such advalorem taxes which would pay the privilege tax provided in the various Acts, provided it manifested its acceptance of such exemption in writing and paid such privilege tax. As to the Natchez, Jackson & Columbus R. R. Co. the code of 1880, as shown, repealed its special exemption in its special charter by Sections 597 through 606, and placed its conditional exemption from advalorem taxation upon acceptance manifested, in writing, and upon payment of the privilege tax thenceforward, under the *general law* of the state, thus *withdrawing* any right that railroad company had to claim a special exemption under this special charter. And whether it had an exemption from advalorem taxes thenceforward was to be determined not by reference to a special charter but by reference to the general law, on the subject of privilege taxes enacted from time to time. The Act of 1884 in fixing the privilege taxes did, however, restore by recognition to the Natchez, Jackson & Columbus R. R. Co. the exemption of its charter according to the opinion in the Lambert case. As the Act of 1884 did not pretend to affect Secs. 597 through 606 code of 1880 in imposing advalorem taxes but only Secs. 606-608 relating to the privilege taxes, it is to our mind quite doubtful whether the Act of 1884 did have the effect to restore the charter exemption; but conceding that it did, it is strange that the court in the Lambert case overlooked the Act of 1886, Sec. 6, p. 23, amending the privilege tax chapter, code of 1880, fixing the privilege taxes to be paid by each railroad in the state, and expressly declaring, "That hereafter said railroad companies shall pay privilege taxes respectively 25 per centum greater per mile than is fixed in said Acts" without once alluding to any exemption of the Natchez, Jackson & Columbus Railroad, or any other railroad. Clearly if the exemption of the N., J. & C. R. R. Co. was restored by the act of 1884 it was repealed by said Act of 1886 and was not in existence from that time until the Act of 1890 was passed. The Act of 1890, p. 12, amended the Act of 1884 and then re-enacted it as amended; this seems to have been an ingenious effort on the part of some one who knew that the Act of 1886 had repealed the exemption of the Natchez, Jackson & Columbus R. R. Co. recognized in the Act of 1884, to again restore it by an effort to repeal the Act of 1886 without disclosing the fact or referring to the Act of 1886. But the holding in the Lambert case is that the Act of 1890 continued the exemption, if it existed, and since it is clearly shown that no exemption existed when the Act of 1890 was passed, there was no exemption to be continued, and the Act of 1890 under the rules of construction with reference to taxation most certainly can not be held to have created then *anew* such exemption. It follows from this that when the constitution of 1890 was adopted the Natchez, Jackson & Columbus Railroad had no exemption and consequently section 181 of the constitution had no effect to continue the exemption which was not then in existence. When the code of 1892 was adopted the legislature carrying out the man-

date of the constitution of 1890, paragraph 90 (h) expressly provided in Sec. 2379 that the privilege tax should be imposed on all railroads without a suggestion of any exemption to any, and this code was a revision of all general laws on the subject and wholly omitted all the provisions of the Acts of 1884 and 1890 in respect to exemptions. The scheme of the taxation up to the code of 1892 was that railroad companies might escape advalorem taxation by accepting the provisions of the law as to privilege taxes, in writing, and paying the same. The scheme of taxation under the code of 1892 changed all this and repealed all former exemptions of all railroads from taxation by said section 3379 and said section 3875. A consideration showing that this was the purpose of the legislature is the smallness of the privilege tax under Sec. 3379 no longer in lieu of advalorem taxes as compared with its amount under former laws. The code of 1892 provides for the exemption of all property which is to be exempt in Sec. 3744 and railroads are not mentioned in that section; the provision of that section is as follows: "The following property and NO OTHER shall be exempt from taxation" which declaration is as positive and emphatic an exclusion of all railroad exemptions as language can furnish. But not only did section 3379 of said code impose privilege taxes but section 3875 imposed advalorem taxes. By that section every railroad company in the state without exception was required to return all its property within and without this state with its value so that the assessors might know what value should be the basis of state, county and municipal taxation and the section further declares as to railroads that all of its property, real and personal, taxable and non-taxable shall be included. The word Non-taxable in this connection does not mean exempt property but property like government bonds that are not taxable at all, and this is made plain by the provision at the close of the section "that if the said property is claimed to be exempt from taxation it shall be separately stated and the law cited under which the claim is made." In other words, they were to return three classes of property, taxable property, non-taxable property, that is, property that could not be taxed in its nature, and exempt property, if any, citing the law for the exemption. The word non-taxable therefore *creates* no exemption and does not describe exempt property which is otherwise provided for but means merely, as stated, property like government bonds that can not be taxed at all. So that we hold that certainly since the code of 1892 went into effect, and as we think, since the Act of 1886 the exemptions set up by the railroad company in this case were repealed by the legislature, and on this ground independently of any other ground, heretofore set out, the exemptions must be denied.

4th. Counsel for the State Revenue Agent presents another very ingenious view to this effect that the 21st section of the Mobile and North Western charter was plainly prospective and inte ded to carry the benefit of the exemption therein provided only to a company which should build a railroad after the grant to it of the exemption. We think it is entirely clear that said provision was prospective and that the consideration to the state for the grant of the exemption was that recited in the Act, to-wit: "The construction of the railroads provided for therein and the great benefit which the state would receive in the development of its agricultural resources by means of said railroads as works of internal improvement, and also the increased value which would thereby be added to the property of the state thus enabling the state to greatly increase its revenue without burdensome taxation upon the people." That was th

consideration to the state: that clearly was the reason and object of the statute. So far we agree with counsel. Counsel's argument then proceeds to claim that the Act of March 3, 1882, authorized the Memphis & Vicksburg Railroad Company and Mississippi Valley and Ship Island R. R. Co. to consolidate, and that the object was to construct a railroad from Memphis through Vicksburg to Ship Island—a scheme well known to be dearly cherished by the people of Mississippi for years back. Counsel then proceeds to claim that section 1 of the Act of March 3, 1882, in providing that the consolidated company should have all the rights, property, immunities, etc., NOW possessed by the companies which may enter into such consolidation merely meant such rights, etc., as belonged to the companies existent at the date of the passage of the Act: that as the Baton Rouge R. R. Co. was not chartered until March 9, '82, it was not contemplated that THAT company should be a constituent member of the consolidation and that section 5 of the Acts of 1882, p. 1015, was meant by the legislature to extend the exemption of said 21 section to such road only as the Consolidated Company—the L., N. O. & T. R. R. Co.—might build AFTER it came into existence; and that as said company did not come into existence until after the road from Memphis to New Orleans was completed, it is a perversion of the spirit and purpose of the legislature to allow the L., N. O. & T. R. R. Co. to blanket this exemption over a road which was never built by it, and in the construction of which it incurred no indebtedness. This is certainly very persuasive, but we do not now decide whether it is a correct contention or not. Another contention of counsel for the Revenue Agent, worthy of serious consideration, is this: that taking the charter of the Baton Rouge Company and the Memphis and Vicksburg Company as written into the charter of the L., N. O. & T. Co. as part thereof, the legislation of the state shows that it was the purpose of the legislature to extend this exemption of the 21st section to the company created by the FIRST consolidation, the L., N. O. & T. R. R. Co., but to exclude it from the present Y. & M. V. R. R. Co., the result of the SECOND consolidation. Counsel's argument on this point is about as follows: That conceding that the first section of the Act of March 3, 1882, the L. N. O. & T. charter—contained the word "immunity" and that by virtue thereof the exemption of the said 21st section passed to the L. N. O. T. R. R. Co., the only authority for any future consolidation of the said L. N. O. & T. R. R. Co. with the Y. & M. V. R. R. Co. is to be found in section 16 of the Baton Rouge charter and section 25 of the Memphis and Vicksburg charter and that in both these sections the legislature intentionally omitted the word "immunity" and any other words equivalent thereto, and that this omission conclusively shows that it was the purpose of the legislature to limit the existence of the exemption provided by said 21st section to the L. N. O. & T. Railroad Co., the result of the consolidation of the Memphis & Vicksburg Railroad Co. and the Baton Rouge Railroad Co.—only so long as it retained its existence as the said L. N. O. & T. R. R. Co., and not indefinitely to pass this exemption along to all future consolidations. Counsel has so succinctly stated the facts on this subject that we cannot do better than to quote that part of his brief, which is as follows: "All of these sections thus put in the same charter, demonstrate that it was the purpose of the legislature to pass the exemption into the L. N. O. & T. under the word *immunities* but to withhold it from any future consolidation by omitting the word *immunities*, in said sections 16 and 25; and by using therein no words to indicate the intention

of passing the exemption to any future consolidation. But, in this connection, the court will bear in mind that the Act of 1890 as to the sale of the N. J. & C. R. R., on which the Lambert case is based, used the word *immunities*, as elsewhere shown. When the legislature passed the Act of March 3, 1882, the L. N. O. & T. charter, it necessarily had in mind the provisions of the charters of the M. & V. Co. and the Miss. Valley and Ship Island Co., because both of these companies are mentioned in the very beginning of the Act, and it was passed for their express benefit; and the legislature made these charters necessary parts of the Act because, by its terms, it could not be made effectual without the charters of said Consolidated Company be taken and held to be parts of this Act." "Said M. V. & S. I. R. R. Co. was incorporated in 1871, Acts 1871 p. 237, as the Vicksburg Pensacola & Ship Island R. R. Co. In 1873 its name was changed to M. V. & S. I. R. R. Co. Acts 1873 p. 562. The 15th section of the original charter of this company gave the power of consolidation (Acts 71 p. 247) but omits the word *immunities* and gives no power to vest in the consolidated company the exemption from taxation contained in the 21st section of the charter. Besides the amedatory Act of 1873 which vested this exemption from taxation in the charter as amended. uses the word *immunities*, in Sec. 1, p. 562, Acts 1873. The charter of the Y. & M. V. Co. uses the word *immunities*, to embrace exemption from taxation, Acts 1881, p. 343 Sec. 5. The amendment of the Y. & M. V. Co. charter, Acts 1884, sec. 3, p. 985 uses the word *immunities* for the same purpose. The amendment of the L. N. O. & T. charter, Acts 1884 p. 936 uses the word *immunities* for the same purpose. All these things were in the mind of the legislature as parts of said Act of March 3, 1882, and show they used the word *immunities* advisedly, and did not intend that any exemption should pass into any FUTURE consolidation, after the formation of the L. N. O. & T., and this section 15 of the M. & V. & Sh. I. R. R. Co expressly provided that any consolidation should FORM ONE COMPANY and have a JOINT COMMON stock."

Certainly the significance counsel seeks to have attached to the omission of the word "immunity" in the Act referred to seems fully borne out by the opinion of Mr. Justice Peckham in Phoenix Ins. Co. v. Tennessee 161 U. S. at p. 177; but we decline now to pass definitely upon this contention. There is also much force in another view presented by counsel for the Revenue Agent to the effect that since 1888, the proof in the record shows that the railroad company had been able to declare and pay the annual dividend of 8 per cent upon even its fictitious capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision. There is a rather curious proposition of counsel for the railroad companies in his brief at pp. 118 et seq. The argument is that what was provided by the 21st section of the North Western charter was not an *ordinary exemption* at all, although counsel admits that the Lambert case expressly so decided, but that it was a *contract* of *appropriation irrepealable* in its nature, and not an exemption at all. If counsel's contention as to this is sound, then it is perfectly plain that the claim of rule of property and vested right under former decisions of this court falls at once to the ground; for no one will contend that this court has ever treated the said 21st Section as an appropriation by contract irrepealable in its nature. Counsel's construction is therefore utterly inconsistent with the reiterated claim that the view we take is trenching upon any rule of property laid down in any previous

decison rendered by this court. This is the first time that such a construction was ever presented to this court or asserted in any form.

Finally, all the judges concur that because of the inconsistent compromise verdict, the judgment must be reversed both on appeal and the cross-appeal.

The judgment is reversed both on appeal and the cross-appeal, and verdict set aside, and the cause remanded for a new trial.

NOTE: The above opinion having been filed since the meeting of the court, Woods, C. J., has been unable to prepare his dissenting opinion, but will do so as soon as possible.

3.

MOTION TO STRIKE OUT.

NOVEMBER 28TH, 1898.

8629. WIRT ADAMS, STATE REV. AGT. v. ATS. Y. & M. V. R. R. CO., ET AL.

On motion.

Mayes & Harris for motion; J. A. P. Campbell and Critz & Beckett, contra.

Appellee and cross appellants—the railroads—made a motion to "strike from the files in said cause the document herein filed on the 22nd day of November, 1898, which purports to be the opinion herein of a majority of this court for the reasons following:

1st. For that the same is filed too late, being filed after the said cause was remanded to the lower court to be tried anew; and that the same did not and could not constitute any part of the mandate of this court to the court below, and could not be and was not attached to said mandate; and that the said document was not, and could not be, furnished with said mandate, for the use of the court below and of these parties at the June Term, 1898, of said court below; and at said June Term, these parties, defendants below, were forced into trial of said cause, and to final judgment therein, from which judgment these parties did on the — day of ——, 1898, and before the filing of said document, prosecute their appeal to this court, which appeal was pending herein on said 22nd of November, 1898; and that said document announces decisions on points of law alleged to be controlling in this cause and in said appeal now pending, additional to and different from any decision announced in the abstract of a proposed opinion which was filed herein on the 20th day of June, 1898, and certified to the court below with the mandate as the opinion of this court, all of which is in violation of the statutes of this State in such case provided.

2nd. For the further reason that the filing of such document on the 22nd of November, 1898, under the facts and circumstances hereinbefore set forth, and the affecting this cause therewith as the decision of this court, is in violation of the Fourteenth Amendment to the Constitution of the United States, not being due process of law."

WHITFIELD, J. Section 4352 and section 4381 of the code of 1892 were fully complied with by the summary of holdings handed down in June last, certified to and used in the circuit court on the trial of the case after it was remanded.

Every reason for decision contained in that summary is also set out in the opinion filed recently, insisted on and enforced. The court has receded from no position in that summary announced. It has added one new reason, and one only, for the decision: That the exemption was repealed by legislation, to-wit: The act of 1886 and the provisions of the code of 1892. With this single exception the reasons given for decision in the summary are identical with the reasons given in the opinion now on file. And it is too plain for argument that had the new reason for de-

cision now set out in the opinion been also set out in the summary the circuit court would merely have had one more reason for sustaining the action it took. The railroad companies were not and could not possibly have been prejudiced by the fact that the summary did not contain this additional reason. Nor is it now nor can it be prejudiced now by the fact that the opinion does not contain this one additional reason for our decision.

Other views of counsel are adverted to in the opinion, but it is distinctly declared that as to them we decide nothing—not adopting them in any wise as reasons for decision. Moreover, we distinctly stated in the summary, "there are other views leading to the same conclusion which we may embrace in the opinion yet to be filed. What we have said is a mere summary of the holdings set forth." And at the last term of this court a motion was made to have a fuller opinion handed down then before the trial in the circuit court based on section 4352, code 1892, which we overruled on the ground that the summary was a sufficient compliance with that section and should stand as the opinion of the court for the time being. The argument made then, and repeated now, as to this was that the law requires the opinion to accompany the mandate and that the court below could not proceed without both. This point was disposed of adversely to this contention in Foster v. Gordon, 54 Miss., p. 510, the court saying: "This is an erroneous conception of the province of the mandate. It is the judgment of this court reversing and remanding a case which gives the lower court authority to enter upon a new trial." And the opinion of this court is not more necessary to the jurisdiction of the circuit court than the mandate. Both are mere matters of practice. Beyond this the scope of the motion is to assert the proposition that this court has not the power after the trial of a remanded cause in any way to revise, add to or take from the mere reasons for its decision, even though the reason added or taken away in no wise affected the party losing in the lower court prejudicially.

That, precisely and exactly, is the proposition asserted. It is hardly necessary to say that this wholly novel and extraordinary proposition is untenable. This court, of equal and co-ordinate dignity with the legislative and executive departments in matters judicial, "uttering the voice and registering the will of the State," is reduced to no such pitiable plight. The very question here presented has been settled by authority over and over again. In Houston v. Williams, 13 California, 24, Mr. Justice Field, afterwards on the supreme bench of the United States, says for an unanimous court after citing the statute there relied on which provided that "all decisions given upon an appeal * * * shall be given in writing with the reasons *therefor* and filed with the clerk of the court." It will not be impertinent to say a few words as to the control of the courts over its opinions and records. There are some misapprehensions on the subject, arising chiefly from a confusion of terms and from a misconception of the relations of the different departments of government to each other and the entire independence in its line of duties of the judiciary. The terms 'opinions' and 'decisions' are often confounded, yet there is a wide difference between them and in ignorance of this or by overlooking it, what has been a mere revision of an opinion has sometimes been regarded as a mutilation of a record. A decision of a court is its judgment. The opinion is the reasons given for that judgment. The former is entered on record immediately upon its rendition and can only be changed through a regular application to the court upon a petition for rehearing or a modification. The latter is the property of the judges subject to their revision, correction and modification in any particular deemed advisable until, with the approbation of the writer, it is transcribed in the records. * * *

All these errors whether in language from or *substance* should be corrected

before a publication is permitted as an authoritive exposition of the law and as such binding upon the court. In no civilized State except California has the existence of this power ever been doubted. Every judge from the chief justice of the supreme court of the United States down, claim and exercise without question the right of revision including thereby *modification* and *partial suppression of his opinions.* * * * When the opinions have been revised and finally approved and recorded, then they cease to be the subject of change."

There has been no suppression here. The majority of the court have receded from no position announced in the summary but positively affirm every one of them in the opinion. And that this is so we here make part of this opinion that summary in its entirety so that a comparison of it with the opinion now on file may show the facts as they are. That summary is as follows:

SUMMARY OF THE COURT'S HOLDINGS.

WHITFIFD, J. First. Because of the inconsistent, compromise verdict, the judgment is reversed, and cause remanded, on the appeal and the cross-appeal.

Second. The Lambert case is res adjudicata as to the taxes for the year 1892 on all the property that originally belonged to the N. J. & Columbus R. R. Co., which was in Adams county, and being res adjudicata, it is, as to that, beyond our power to over-rule it.

Third. The Lambert case is not res adjudicata as to any of the other taxes here involved, on the property that once belonged to the N. J. & Columbus R. R. Co., or on any of the other property here involved.

Fourth. The Lambert case did decide that §180 of the constitution of 1890, did not cut off the exemption from taxation asserted in this case, on the ground that this is a case of mere merger, and not of consolidation; that the resultant corporation was not a new corporation, and applied the principles of Whitworth v. Tennessee, 117 U. S.—which, is beyond all controversy—a clear case of simple merger, and not of consolidation, taking merger proper to mean the absorption of one corporation, by another, the autonomy of the absorbing corporation being preserved, without the formation of a new company, and consolidation proper to mean such union of two corporations as results in a third new corporation, under whatever name. We hold that the clear Legislative purpose was—(using the words in the sense incidated)—*consolidation, and not merger*, yet consolidation in such sense as to result in the formation of a new corporation; and besides that what was *actually* done here was necessarily the creation of a new corporation, and not mere merger; that, hence, the principles of the Whitworth case do not apply, but the principles of Keokuk v. Mo. 152 U. S. do apply; that, consequently the constitution of 1890, §180, cut off the exemption; that the Lambert case cannot be upheld and should be, and is hereby overruled. If it be conceded that the purpose aimed at by the articles of agreement of the R. R. Co. was mere merger, it is not to be permitted that the Co. could overthrow the purpose of the Legislature to authorize consolidation and not merger, nor to NAME THAT, merger, which the actual things done show, was consolidation. Consolidation is a privilege, to be exercised or not—not a contract. §181 of the constitution, and §279 of the schedule thereto, merely mean that so long as corporations existing at the adopton of the constitution having then exemptions, or other "rights" should have them "continue," so long as such corporations retained the *precise corporate existence they then had.* The new corporation here, takes its life as from a new grant of corporate life from the date of the consolidation.

But we hold further, that the 21st section of the Mobile & Northwestern R. R. Co.'s charter was an effort to secure —as is expressly recited in its face—an irrepealable grant of exemption, and violative of the constitution of 1869, §13, art. 12, and and §20, art. 12, even as con-

strued in Miss. Mills v. Cook, 56 Miss. The exemption claimed in Miss. Mills v. Cook HAD NO IRREPEALABLE feature.

But again, we hold, that such section violated said clauses of said constitution, even had it not been irrepealable. Miss. Mills v. Cook, turned upon some supposed magical distinction in the particular connection, between the words "SUBJECT" and "SUBJECTED," and sacrificed a great constitutional principle to a piece of mere verbal jugglery. Precisely the SAME clause, using precisely the SAME word "SUBJECT occurs in the constitution of Florida and Arkansas and the supreme courts of both States held, in precisely identical contention, that the clause forbade exemption from taxation of "corporations for pecuniary profit," and both of these decisions were on this identical proposition, affirmed by the U. S. supreme court. St. Louis &c. v. Berry, 41 Ark., 509, 115 U. S. 475; and L. & N. R. R. Co. v. Palmes, 19 Fla. 231 and 109 U. S. 253-254. And this construction is reaffimed in Keokuk, &c. v. Missouri, 152 U. S. 310-311. The word "subject" should have been given its plain, popular signification, occurring in the connection it did, in a great popular instrument—the constitution—the very signification attached to it by the supreme court of the United States. We prefer to align ourselves now with that court in this matter, and overrule Miss. Mills v. Cook on that point.

It passes all understanding how the court could gravely hold, in Miss. Mills v. Cook, that a solemn declaration in the constitutionof a State—its organic law — formulating FUNDAMENTALLY GREAT LINES OF PUBLIC POLICY—that "the property of all corporations for pecuniary profit" should be subject to taxation *the same as that of individuals*, added no new feature, but merely stated what was the law before and without the declaration, to-wit: that the "property of corporations for pecuniary profit" was *liable* to taxation. All the world knew that before!

Judge Campbell, in his dissenting opinion, in Beck v. Allen, 58 Miss., at p. 177, most wisely said: "Subtilty and refinement and astuteness are not admissible to explain away an expression of the sovereign will. The framers of the constitution, and the people who adopted it, must be understood to have intended the words employed in that sense most likely to arise from them on FIRST READING THEM." Doubtless the rule of stare decisis is a wise rule, and one not lightly to be infringed. But instances justifying its disregard find manifold illustration in the reports. And surely, stronger reasons for not applying it can never arise, than, where, as here to disregard it, restores to the sovereign the exercise of one of the highest attributes of sovereignty—the taxing power, and merely requires that corporations for pecuniary profit, constantly demanding and securing the protection of the government, shall also bear their just share of the burdens of taxation. We feel, therefore, confident of the propriety of over ruling, as we now expressly do—the Lambert case, and the case of Cook v. Miss. Mills, supra. There are other views leading to the same conclusion, which we may embrace in the opinion yet to be filed. What we have said, is a mere summary of the holdings set forth.

Reversed and remanded.

But the California case is not the only authority. In the appendix to 131 U. S., at p. 18, it is said: "Judges frequently correct their opinions in the hands of a reporter after a printed copy has been filed with the clerk." * * * If one curious in such things would know how far back this corrective practice has existed let him look as far back as the 7th of Cranch, 1st edition, where he will find corrections made by Mr. Justice Story in the opinion of the court delivered by him in Barnitz v. Casey, 7th Cranch, at p. 456. In later editions the changes are incorporated in the text. We have examined this first edition and it is there stated on the page following the table of cases cited in that volume as follows: "*Since this volume was printed*, Mr. Justice Story has re-

quested that the following corrections and *additions* should be made in the opinion delivered by him." So that illustrious judge actually corrected and added to his opinion in 7th Cranch after the official volume of reports had been published. So far as due "process of law is concerned," it is too obvious for discussion that it cannot be involved in mere matters of practice of the courts.

We conclude with these words of Judge Field in the case cited:

"The power over our opinions and the records of this court we shall exercise at all times, while we have the honor to sit on the bench, against all encroachments from any source, but in a manner we trust befitting the highest tribunal in the state." The motion is denied.

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FEBRUARY 20TH, 1899.

VOL. II. JACKSON, MISS., SATURDAY, FEBRUARY 25, 1899. No. 11.

9251. Y & M. V. R. R. Co., ET AL v. ADAMS, REV AGT.

Circuit Court, Hinds County; Robert Powell, Judge.

Mayes & Harris and Cooper & Waddell for appellants; J. A. P. Campbell and Critz & Beckett for appellee.

WHITFIELD, J. The petition for removal of the cause to the federal court was properly denied. The decisions of the United States Supreme Court cited in briefs of counsel for appellee put this at rest. K. C. R. R. v. Doughty, 138 U. S., 303; Ten v. Bush, 152 U. S., 454; Galveston v. Texas, 170 U. S., 226.

The application for continuance was properly over-ruled. The court's action in striking out the special pleas stricken out was correct, for the obvious reason that they presented no defense to the action, in whole or in part. The former opinion of this court in this case settled definitely and conclusively all the issues involved, and the special pleas are in effect, nothing else than an effort to have the circuit court disregard that opinion. The futility of that sort of pleading needs no comment.

These matters of practice and procedure and all the other assignments of error touching matters of practice and procedure were correctly settled by the court. The former opinion of this court in this cause, and its opinion on the motion to strike that opinion from the files disposed effectively of such of these matters as are not here specifically adverted to.

So far as concerns the argument that the appellants relied on the case of Mississippi Mills vs. Cook, 56 Miss., and that if the over-ruling of that case is correct, nevertheless the appellants should be protected from taxation accruing before the over ruling of that case, it is enough to say that question is not material here, since all the taxes here sued for, accrued after the consolidation of October 24 1892, and the appellants were expressly held to have lost their exemption, if any they had, by their own voluntary act of consolidation. That was the first and main ground on which our former opinion was distinctly rested. It must be too clear for serious disputation, in this view, that all discussion of the case of Mississippi Mills vs. Cook is wholly unavailing as to these taxes. Moreover, the twenty-first section of the Mobile and Northwestern charter was not passed on in Mississippi Mills vs. Cook, and we held in our former opinion that its constitutionality was never squarely presented, as to the point for decision,

until the judgment in the case. Whatever merit there may be in this line of argument in a proper case, it is clear that here it has, by reason of the fact of the consolidation when and as it occurred, no room for play.

The last proposition which we notice is the one that the Lambert case, in 73 Miss., was erroneous and ought not to be followed, in its announcement that the code of 1880 repealed the exemption here claimed. It was said, *inter alia*, that the Mobile and Ohio Railroad company had an identical exemption with the twenty-first section of the Mobile and Northwestern charter, and that section 598 of the code of 1880 by providing for a "sworn statement of the capital expended in the construction of its road," recognized the exemption, and meant by this section 598 to furnish the State with the means of knowing when the M. & O. Railroad company should become liable to taxation; and that since it recoguized the M. & O. Railroad company's exemption, of course, it must also have recognized the alleged identical exemption of appellants. Such was the argument gravely pressed upon the court. It is singular that learned counsel overlooked the easy and overwhelming answer springing from the fact that the twenty-first section of the Mobile & Northwestern charter was granted by an act of the legislature passed in 1870, *after* the constitution of 1869 was apopted, while the charter of the Mobile & Ohio railroad company was granted in 1848, twenty-one years before that constitution was adopted, at a time when the legislature had full power to grant, so far as any constitutional restriction was concerned, an irrepealable exemption.

But it is said that section 8 of the Code of 1880 provides that "no private act, not revised and brought into this code, shall be affected by its provisions," and that general laws as to taxation ought not to be held to repeal private grants of exemption, unless expressly so stated. The principle is correct enough. But we think the alleged exemption of the Natchez, Jackson & Columbus Railroad company, expressly repealed. There were two bills of injunction in the Lambert case—rather there were two cases. The court distinctly held that this exemption from taxation was an exemption both from ad valorem taxes and privilege taxes. Now the scheme of railroad taxation provided by the code of 1880 was primarily to subject, "each railroad owning and operating a railroad in this state" to ad valorem taxes. That scheme is set forth in sections 597-606, code of 1880, inclusive. But secondarily, and as a substitute each railroad was permitted by sections 607 and 608 of that code, to escape ad valorem State and county taxes by paying the privilege tax named in section 608. Now the Natchez, Jackson & Columbus railroad company is expressly named in section 608, and required to pay a privilege tax of $30 per mile, if it would escape ad valorem State and county taxes. Manifestly no one can be found who would dispute the proposition that the exemption from privilege taxes of that railroad was expressly repealed by section 608. But since this privilege tax was provided only secondarily, and as a means of escaping the ad valorem State and county taxes due by each railroad in the State, primarily imposed by section 597 *et seq.*, it is plain that all the sections taken together expressly provide that the N. J. & C. R. R. Co., was to pay ad valorem taxes, State and county, unless it embraced the conditional exemption therefrom by paying the privilege tax assessed by section 608 *eo nomine*, against it. There is no escape from this reasoning. If it be asked why, if the N. J. & C. R. R. Co., was expressly named in section 608, it was not so named in section, 597 *et seq.*, the obvious reason is that it was necessary to expressly name it in imposing privilege taxes, since each railroad paid a different privilege tax; but it was unnecessary to name it in imposing ad valorem taxes, since the rate there was the same for all. And this leaves out of view

whatever of force there may be in the suggestion that the phrases "each railroad," "every railroad," etc., might be effective to include this railroad with all others as fully as if named in section 597. But as to this we say nothing.

Finally it is said that this twenty-first section was given the L. N. O. & T. R. R. Co., by independent grant in 1882, by its proper charter, after the code of 1880 had been adopted. But if the code of 1880 had the effect, as held in the Lambert case, to repeal by its provisions this section as applied to the N. J. & C. R. R. Co., then *a fortiori*, did the more emphatic provisions of the code of 1892, have the effect to repeal the same section as applied to the L. N. O. & T. R. R. Co. This last company could not be named in the code of 1880, since it did come into existence till 1882.

It will be remembered that this third ground of our former opinion—that this alleged exemption was repealed by legislation if it ever had a valid existence—was wholly uninfluential with the circuit judge, on this second trial below, since it was for the first time made part of the opinion, when the opinion in full was written and filed, which was several months after the trial in the circuit court. It is perfectly obvious, therefore, that the mere adding a new reason for the decision which reason did not influence the second trial of the case, in no respect prejudiced the appellants in the trial.

We discover no error and the judgment is affirmed.

C. J. Woods, while recognizing the authority of the former decision to the effect that the consolidation cut off the exemption under section 180 of constitution of 1890, and not, therefor dissenting, adheres to the view formerl expressed by him.

~~9294. MOORE v. M. & O. R. R. Co.~~

~~Circuit Court, Monroe County. E. O. Sykes, Judge.~~